THE CENTRAL LAW JOURNAL.

SEYMOUR D. THOMPSON, JOHN D. LAWSON, Editors. | ST. LOUIS, FRIDAY, DECEMBER 15, 1876. | Hon. JOHN F. DILLON, Contributing Editor.

The publishers of the CENTRAL LAW JOURNAL take pleasure in announcing to their patrons, that after the first of January next the JOURNAL will be under the exclusive control of Mr. Thompson, the present managing editor, who has purchased the same. It is intended by Mr. Thompson to continue the JOURNAL on substantially the same basis as heretofore. Arrangements have been made which will, it is believed, secure the co-operation of all parties who have formerly been identified with it, either as publishers or editors, and which will insure its future permanency. Mr. Thompson desires to state for himself that he hopes to make arrangements by which the value of the JOURNAL as a legal newspaper will be greatly enhanced; and to this end the co-operation of the friends of the JOURNAL, including judges of the courts and reporters, is earnestly solicited. Mr. Thompson would also state that he hopes to make some improvements in the typographical appearance of the JOURNAL, such at least as may be made without substantially diminishing the amount of matter published, and he earnestly invites correspondence with the subscribers of the JOURNAL, as to what improvements are desirable. He would be obliged if correspondents would express their views as to whether the JOURNAL should be changed from a quarto to an octavo form, and whether, instead of making one volume per annum, it would not be better to make two, so that it may be bound in books of smaller size,—a plan which would give a semi-annual index. The views and criticisms of the friends of the JOURNAL, upon these and any other points relating to its future management, will be gratefully received.

All communications relating to the conduct of the JOURNAL during the coming year should be addressed to

SEYMOUR D. THOMPSON,
Chamber of Commerce,
St. Louis, Mo.

Current Topics.

We have received a letter from a subscriber signed "Lawyer," complaining of the quality of the paper and binding of the 78th volume of the Illinois Reports. He thinks that such a volume should be furnished to the profession for half the money. He suggests that the bar of Illinois are subjected to an imposition in this respect. In a private note over his real name, he asks us to publish the communication in this journal. This reminds us somewhat of the monkey using the paws of the cat to pull the chestnuts out of the fire. Our correspondent is quite willing that we should take the responsibility of making an attack upon the reporter of the Illinois Reports and his publishers, by publishing an anonymous communication which he furnishes us, the language of which is a great deal more severe than we have indicated above, while he is apparently not willing to take the same responsibility himself, by sending his letter of complaint over his real name. We have received several complaints of the same nature in regard to the quality of Missouri Reports, but have withheld publishing them for the same reason. In matters of this kind, which are apt to bring us into unkind personal relations with authors and publishers, we must beg our correspondents to assume their share of the responsibility by sending their communications over their proper signatures. We will not allow anonymous writers in cases of this kind to cover themselves behind a responsibility which we are obliged to assume, if we publish their communications.

The tragedy at Brooklyn may be said to have temporarily awakened the people of the large cities and towns throughout the land to something like a realization of the fact that, almost without exception, in the midst of each and every of their communities, there exist just such means for just such a holocaust. As this quickening on the part of the public, at most, can last but a very few weeks, it behooves those in whose hands the power lies, to see that the demands of the people for protection shall be satisfied, before prudence and apprehension on their part shall be succeeded, as it is certain to be, by *laissez faire*. By legislative act and municipal ordinance, the builders and owners and proprietors of theatres and public halls should be forced to have their buildings in such a condition, as to means of exit, as to satisfy a competent inspector that the places could be emptied safely and speedily. We would venture to hope that in such an event the disposition of the courts would be, if ever called upon to interfere with such conditions on the ground of property rights, to refuse relief on a higher ground. Exactly how far the law, should go in attempting to prevent such horrors as that at Brooklyn, may not be clear, but there is a point, certainly, where private right ends and public safety begins. St. Louis can not boast of being better off than her sister cities in this matter. Two of our largest halls are only reached by a succession of narrow stairways; the entrance to the galleries of one of our principal theatres is as wretched and dangerous as it could possibly be; that of the other is somewhat better, and we are glad to see the manager, in a daily paper, announce a further improvement. The subject has been before the city council, and was received favorably, and a committee appointed. We can not refrain from noticing the objection made to the investigation of the matter by one member, on the ground that it would cause excitement in the public mind, and loss to the managerial pocket. The fool in Æsop who would not venture into the water until he had learned to swim, is translated into a sage in the presence of this individual. We hope that the investigation will result in such a reconstruction of the entrances to our theatres and halls, as will be sufficient for all requirements, not only in case of a fire, but of a panic.

Can a convict who is serving out a term in prison be executed for a second offence, before his prior sentence of imprisonment expires? In *Thomas v. The People*, the defendant while a prisoner under a fifteen year's sentence for burglary was convicted and sentenced to be hung for a murder committed in prison. Before the New York Court of Appeals it was contended that a subsequent conviction of a person for a crime committed after one for which he was under sentence, could not impair, alter, change or annul his first sentence. It was argued that the first sentence being a valid sentence, it could only be changed, reversed, altered or annulled by a writ of error, or a pardon. The first sentence remained a valid sentence until vacated or set aside by a court of competent jurisdiction, and then it could only be vacated upon the application of the person under sentence. No mat-

ter how unjust or erroneous a sentence might be, yet until the prisoner himself moves for the correction of the error, the power to correct it, after the sentence is in process of execution, lies in no court, or even the people, but only in the prisoner himself, and the governor, under and by virtue of his pardoning power. No case, it was said, could be found where it was ever claimed by the court, much less held, that after a person has been tried, convicted and sentenced, and the sentence being carried into execution, the court that passed the sentence, much less another and different court, could of its own motion, or of anyone's else, save that of the prisoner, assume jurisdiction again of the person and subject matter, and change, annul, alter or modify the former sentence in any respect. If the court cannot change, annul, alter or modify directly a prior sentence, can it be done indirectly? or can it be done by the prisoner committing a subsequent offence, and then by a subsequent trial, conviction and sentence? Bishop, Crim. Law, vol. 1, 5th ed., sec. 953, lays down the rule thus: "When a prisoner under an unexpired sentence of imprisonment is convicted of a second offence, or when there are two or more convictions on which sentence remains to be pronounced, the judgment may direct that each succeeding period of imprisonment shall commence on the termination of the period next preceding." In King v. Bath (1 Leach, 4th ed. 441), it was held that "a sentence of transportation may be a second time passed upon a prisoner, although the time for which he was before transported is unexpired." In Russell v. Commonwealth, (7 Serg. & Rawle, 489), it was held that "when a person has been sentenced to hard labor on a former indictment, and the term of imprisonment is not yet expired, sentence of imprisonment may be passed upon another indictment, to commence from the day on which the former sentence is to expire." The court in this case says: "But to consider the question on principle. Where a man has been sentenced to imprisonment for one offence and is afterwards convicted of another, what can be so proper as to make his imprisonment for the second offence commence after the expiration of the first imprisonment? Would it not be absurd to make one imprisonment a punishment for two offences? Nay, the absurdity does not end here, for unless imprisonment for the last offence is to begin where the imprisonment for the first ends, it would be impossible under our system to punish the offender at all, in certain cases, for the last offence. Suppose, for instance, one who has been convicted of burglary and sentenced for seven years, should afterwards be convicted of larceny, for which the law does not authorize an imprisonment longer than three years, these three years must either be made to commence after the expiration of the seven years, or they will be merged in them, and gave no punishment at all." The court reserved decision.

The salary of a judicial or other public officer while in the hands of the disbursing officer of the general or municipal government in his official capacity, in common with other money to be applied by him towards the payment of judicial and other official salaries according to law, it is held in the same state in the recent case of *Remmey v. Gidney, et al.* can not be seized or taken under attachments, judgments, executions or supplementary proceedings founded thereon or taken in aid thereof; in other words, the public moneys specifically appropriated to the payment of judicial and other official salries can not be diverted from their legitimate object while in the hands of the disbursing officer of the public. The Supreme Court of the United States declared against such diversion of the public moneys in the case of certain seamen of the frigate Constitution (see Buchanan v. Alexander, 4 How. U. S. Reports, 20). That learned court, in delivering its opinion, said "that if such appropriations may be diverted and defeated by state process or otherwise, the functions of the government may be suspended; that so long as money remains in the hands of the disbursing officer it is as much the money of the United States as if it had not been drawn from the treasury; that until paid over by the agent of the government to the person entitled to it, the fund can not in any legal sense be considered a part of his effects, and that the purser (who was in that case the disbursing officer) was not the debtor of the seamen" The court, in deciding further, observed: "A purser, it would seem, can not in this respect be distinguished from any other disbursing agent of the government. If the creditors of these seamen may, by process of attachment, divert the public money from its legitimate and appropriate object, the same thing may be done as regards the pay of our officers and men of the army and of the navy, and also in every other case where the public funds may be placed in the hands of an agent for distribution. To state such a principle is to refute it. No government can sanction it. At all times it would be found embarrassing, and under some circumstances it might be fatal to the public service." The same principle was applied to the case of a school teacher by the Kentucky Court of Appeals (see Tracy v. Hornbuckle, 8 Bush, 336; 12 Albany L. J., 391: and see opinion of McAdam, J., in Dubernet v. Clyde, filed May 16, 1876). The New York Court of Appeals in Bliss v. Lawrence (58 N. Y. 445, 451) use the following language in stating the same general principle: "The public service is protected by protecting those engaged in performing public duties; and this, not upon the ground of their private interest, but upon that of the necessity of securing the efficiency of the public service by seeing to it that the funds provided for its maintenance should be received by those who are to perform the work, at such periods as the law has appointed for their payment. To this extent, we think, the public policy of every country must go to secure the end in view." The Supreme Court of Tennessee in Bank of Tennessee v. Dibrell 3 Sneed., 379 held that "the relations of debtor and creditor, in the sense of the attachment and garnishee laws, does not exist between the state and its employees; the funds set apart for that purpose belong to the state and not to him who renders such service, until they pass out of the treasury and the hands of disbursing agents." The Supreme Court of Pennsylvania, in Bulkley v. Eckert (3 Penn. State Reports, 368), decided that money held by a person in his official capacity as treasurer of the board of school directors—in common with other money to be applied towards the payment of teachers, according to the rules and regulations of the acts of assembly for the maintenance of public scools, and not as private debts due from him to the defendant—could not be attached under their laws. The principles adverted to are generally applicable to all persons holding in any legal capacity the funds of another's debtor. Clerks of courts and sheriffs (7 Humph., 132); pursers in the navy, as to the pay of seamen (4 How. U. S., 20, *supra;* 2 Cranch's C. C. 344); municipal corporations, as to the salaries of their officers (11 Missouri, 59; 6 Vermont, 121; 12 Conn., 404), have been held to be included in this exemption from garnishment. To the same effect see Chealy v. Brewer 7 Mass. 259; Devine v. Hawie, 7 Monroe, 439; Spaulding v. Imly 1 Root, 551; Baily v. The Mayor etc., 3 Hill, 531; Lowber v. The Mayor etc., 7 Abb. Pr. 252.

—The English Bar.—The examinations for candidates at the bar in England are growing more severe. This year, at the final bar examination, out of 63 candidates no less than 34 were rejected, and only 29 passed. There is a great deal of grumbling among those who have failed, especially those who have come up with high university reputations, and who have been plucked more than once in their examination.

Negotiable Instruments Obtained by Fraud.

In the Supreme Court of the United States during the present term, in the case of *Dresser v. The Missouri & Iowa Railway Construction Co.*, defendant's promissory notes for $10,000, obtained by fraudulent representations, were purchased by the plaintiff, who had no notice of the fraud, for a valuable consideration, $500 of which was paid. Before further payments on the purchase were made, plaintiff received notice of the fraud. The court, Mr. Justice Hunt, delivering the opinion, held in an action on the notes that plaintiff was entitled to recover only the $500 paid before notice of the fraud. The plaintiff contended that negotiable paper may be sold for such sum as the parties may agree upon, and that whatever the sum, the title to the entire paper passes to the purchaser. This is true, said the court, and if the plaintiff had bought the notes in suit for $500, before maturity and without notice of any defence, and paid that sum, or given his negotiable note therefor, the authorities cited show that the whole interest in the notes would have passed to him, and he could have recovered the full amount due upon them. Fowler v. Strickland, 107 Mass. 552; Park Bank v. Watson, 42 N. Y. 490; Bank of Michigan v. Green, 33 Iowa, 140. The present case differs from the cases referred to in this respect. The notes in question were purchased upon an unexecuted contract, upon which $500 only had been paid when notice of the fraud and a prohibition to pay was received by the purchaser. The residue of the contract on the part of the purchaser is unperformed and honesty and fair dealing require that he should not perform it; certainly that he should not be permitted, by performing it, to obtain from the defendants money which they ought not to pay. As to what he pays after notice, he is not a purchaser in good faith. He then pays with knowledge of the fraud, to which he becomes a consenting party. One who pays with knowledge of a fraud is in no better position than if he had not paid at all. He has no greater equity and receives no greater protection. Such is the rule as to contracts generally. In the case of the sale of real estate for a sum payable in installments, and circumstances occur showing the existence of fraud, or that it would be inequitable to take the title, the purchaser can recover back the sum paid before notice of the fraud, but not that paid afterward. Barnard v. Campbell, 53 N. Y. 73; Lewis v. Bradford, 10 Watts, 82; Invenal v. Jackson, 2 Harris, 529; id. 430; Youst v. Martin, 3 S. & R. 423, 430. In Weaver v. Barden, 49 N. Y. 291, the court use this language: "To entitle a purchaser to the protection of a court of equity, as against a legal title or a prior equity, he must be a purchaser for a valuable consideration, that is for value paid. Where a man purchases an estate, pays part and gives bond for the residue, notice of an equitable encumbrance before payment of the money, though after giving bond, is sufficient. Touville v. Naish, P. Wms. 306; Story v. Windsor, 2 Atk. 630. Mere security to pay the purchase-price is not a purchase for a valuable consideration. Hardinghan v. Nicholls, 3 Atk. 304; Maundrell v. Maundrell, 10 Ves. 236, 271; Jackson v. Caldwell, 1 Cow. 632; Jewell v. Palmer, 7 Johns. Ch. 65. The decisions are placed upon the ground, according to Lord Hardwicke, that, if the money is not actually paid, the purchaser is not hurt. He can be released from his bond in equity."

In this case, said the court, the plaintiff occupies the same position as the *bona fide* purchaser of the first of a series of notes, of which, after notice of a fraud, he purchases the rest of the series. He is protected so far as his good faith covers the purchase, and no further. Upon receiving notice of the fraud, his duty was to refuse further payment, and the facts before us required such refusal by him. Crandell v. Vickery, 45 Barb. 156, is in point. Holdridge had obtained the endorsement by Vickery of his (Holdridge's) notes by false and fraudulent representations. These notes were transferred to Crandall without notice or knowledge of the fraud, he giving to Holdridge several checks for the amount, upon the understanding that they were not to be presented for payment, but when the money was wanted he was to give new checks as needed. Before giving the new checks, plaintiff was informed of the fraud, and requested not to make payment or to give his checks. He did, however, give his checks, according to the original agreement, and brought suit upon the notes against Vickery, the endorser. It was held that he was not a *bona fide* holder, for the reason that the transaction was executory when he received notice of the fraud; that he had then parted with no value; that the real obligations were given afterward, and under circumstances that afforded no protection. That case is stronger for the holder than the one before us, in the fact that checks were there given on the original transaction, which might have been presented or passed off to the prejudice of the maker, while here the transacttion was oral throughout. To the same purport in principle, although upon facts somewhat different, are the cases of Garland v. The Salem Bank, 9 Mass. 408; The Fulton Bank v. The Phœnix Bank, 1 Hall, 562; and White v. Springfield Bank, 3 Sandf. s. c. 227. The cases are numerous that, where a *bona fide* holder takes a note misappropriated, fraudulently obtained, or without consideration, as collateral security, he holds for the amount advanced upon it and for that amount only. Williams v. Smith, 2 Hill, 301. In Allaire v. Hartshorn, 1 Zabriskie, 663, the case was this: Hartshorn sued Allaire on a note of $1,500, at ninety days, made by Allaire. It was proved that the note had been misapplied by one Pettis, to whom it had been intrusted; that he had pledged it to the plaintiff as security for $750, borrowed of him on Hegeman's check, and also as security for a $400 acceptance of another party, then given up to Pettis. On the trial the court charged the jury that, if any consideration was given by the plaintiff for the note, "they should not limit their verdict to the amount so given, but should find the whole amount due on the face of the note." The case was carried to the Court of Errors and Appeals of the state of New Jersey upon an exception to this charge. The court reversed the judgment, holding that, although a *bona fide* holder, Hartshorn could recover only the amount of his advances.

Mowing Machine Law in Connecticut.

Many of the states, and notably Missouri, have had attacks, more or less serious, of what is popularly known as hay-fork law; but most of them are now either convalescent, or on the verge of convalescence. Connecticut, we are grieved to say, still languishes—in fact, has it bad. The latest phase of the epidemic in that state is manifested in Craft's Appeal, 42 Conn. 146. This was a suit on a negotiable promissory note, by an endorsee before maturity, against the administrator of the maker. The note purported to have been given "for value received in Granite mowing machines." Plea that the note was given in pursuance of an agreement in writing between the maker and payee, "wherein it was agreed that said note should only be paid by said Latham, if he was able to sell sufficient of the machines mentioned therein, on the first of September succeeding the date of said note, and if not, was to be given back to said Latham; that said Latham did not sell sufficient of said machines to pay for said note, but failed so to do; and that said note was utterly and entirely without any consideration, and the same was sold to the appellant by said Mahan, with full knowledge on the part of the appellant of all said facts, and the appellant and said Mahan conspired

together to obtain said notes by false pretenses, and to endeavor to collect the same, by pretending that the appellant was a *bona fide* holder of said note."

The only evidence offered in support of this plea was the following memorandum, in the handwriting of the deceased maker, found among his papers

"June 18th. 1871, I was at Northampton and saw Mr. Craft, asked him about notes that he claimed to hold against me. He said he had but one, and that was the note he gave me a copy of. I asked him how he got these notes. Said they were left with him as collateral, and after I found that they were good, by writing to you, and getting the letter from you, and enquired of different parties, and also of Mr. Wm. A. Allen, I concluded to buy them, which I did at a small discount. I spoke to him about the letter that I wrote in answer to his. I said it read that I had some notes out, given for Granite mowing machines, and if I sold machines enough to come to the notes, they would be paid at maturity; otherwise they would not. He said that the letter did not say so. I asked him what it did say. He said that they would be paid at maturity. I told him I guessed not. He said it was so and we didn't contend about it; neither did I ask him to see the letter. Wrote this on my slate, the 20th day of June, 1871." This evidence was admitted under a statute which provides that in suits against deceased persons, entries and memoranda of the deceased, relative to the matter in issue may be received in evidence; subject, in regard to weight and credit, to the rules under which the testimony of parties and other interested evidence is received.

The plaintiff asked the court to give a charge to the jury in substantial conformity with the doctrine laid down in the recent case of Hamilton v. Marks, 3 CENT. LAW JOUR. 740, but the court refused to so charge, and gave the following instructions:

"In regard to notice there is some controversy, I will adopt the elementary doctrine, which recognizes two kinds; First — particular or explicit, where the purchaser has knowledge of particular facts in regard to the note, as in this case if the appellant had been advised of the terms of the original agreement. Second—general or implicit, where a holder has knowledge that there was some illegality or fraud which vitiated the note, though he was not apprised of its nature.

"If there was a wilful or fraudulent failure to enquire into circumstances, where they were known to be such as to invite enquiry, the jury, if they thought that such abstinence was from the belief that such enquiry would result in finding that the note was invalid, would regard it as a case of general notice. Mere negligence, however gross, not amounting to this wilful or fraudulent blindness, will not of itself amount to notice, though the jury should consider the fact of such negligence, as it may tend to prove such general notice. But if, after all, though there was negligence, the purchase was yet *bona fide*, honest, and in the regular course of business, it is good." Under this charge the jury of course found for the defendant. And on appeal to the supreme court, the charge and verdict were sustained.

Dealing in commercial paper in Connecticut must be a very precarious and hazardous business, if the holder can be found guilty of *mala fides* on such flimsy evidence as was held sufficient in this case—if the maker, by declaring in the presence of the holder who purchased before maturity for value, that before the paper was negotiated he informed him that if he, the maker, sold enough of the property for which they were given to pay them before maturity he would pay them when due, otherwise he would not, and, afterwards, writing down such declaration together with the holder's denial of the truth of such statements, and then dying, can made such memoranda sufficient evidence to impeach the holder's good faith. If Latham's statement to Craft was true, he himself was guilty of gross negligence, in not notifying him of the condition upon which the note was given. Upon his own statement his reply to Craft's enquiry was evasive, and showed no defence against the note. But conceding that Craft was negligent in not calling on Latham to again arise and explain, and that Latham was ordinarily careful and prudent, and granting, as the court did, that mere negligence, however gross, will not amount to notice, what evidence was there that Craft took the note in bad faith? How could there be bad faith without notice of some defence to, or imperfection in, the note? If taking a note under such circumstances as ought to excite suspicion in a reasonable man is not sufficient to defeat the right of an endorsee to recover when labeled "negligence," ought the same circumstances to defeat a recovery under the more imposing name of "bad faith." The distinction that the court drew between special notice and general notice is the same difference that exists between tweedledum and tweedledee, but it is not important.

It is undoubtedly true that the same evidence that tends to show negligence on the part of the purchaser of commercial paper, may go further and show bad faith. But it is the sheerest nonsense to say that having proved negligence, which is something short of bad faith, negligence, being more potent than the facts which established it, may be sufficient to authorize an inference of bad faith. The less does not include the greater. Negligence and suspicious circumstances are mere way stations on the road to bad faith. One does not reach the terminus of a route by going part way, and then inferring that he has traveled the whole dsstance.

M. A. L.

Mechanics' Liens — Essentials to Sub-Contractor's Claim—Pleadings.

McMAHON v. BRIDWELL *ET AL.*

Saint Louis Court of Appeals, November, 1876.

Hon. THOMAS T. GANTT, Chief Justice.
" EDWARD A. LEWIS, } Judges.
" ROBERT A. BAKEWELL, }

1. Lien of Sub-Contractor Limited to Quantum Meruit.—A sub-contractor, having contracted with the principal contractor to furnish for a fixed price material and labor in erecting a building, has no lien against the land on which such improvement is erected for such fixed price, if such fixed price is more than the fair value of his materials and labor furnished.

2. Sufficiency of Petition.—The petition of a sub-contractor to enforce a mechanics' lien, must state the facts necessary for securing a lien under the statute concerning such liens.

3. Construction of Statute.—The mechanics' lien law of this state being borrowed from the Pennsylvania law, the court expresses the opinion that it is committed to any reasonable exposition of it by the Pennsylvania courts, not conflicting with the declared view of the judiciary of this state.

Error to the Circuit Court of St. Louis County.

Philip Donahue, for respondent; *Marshall & Barclay*, for appellants.

GANTT, J., delivered the opinion of the court.

McMahon sued Bridwell, contractor, and Mary H. and James M. Kennedy, as owners of a lot of ground in St. Louis. He filed the following account as the foundation of his claim:

"R. T. Bridwell to John McMahon, Dr.

To contract price of painting house of Mary H. Kennedy and James M. Kennedy, on Laclede Av., St. Louis	$120.00
Extra work on said house, fence and water closet	10.00
Touching up doors and sash	3.50
Dumb waiter	3.00
	$137.50."

The petition alleged that plaintiff did this work according to contract with Bridwell; that within four months after the indebtedness accrued, plaintiff filed this account in the office of the clerk of the criminal court, and in due time gave notice to Mary H. and James M. Kennedy of his demand. Plaintiff was a sub-contractor under Bridwell.

A demurrer was filed to the petition on the ground that it did not state facts sufficient to constitute a cause of action against James M. and

Mary H. Kennedy. Bridwell did not answer. The court overruled the demurrer. The Kennedys then answered, denying that plaintiff furnished materials or labor to the amount of $137.50 in the construction or improvement of their property by virtue of any contract to which either of defendants was a party, and ignoring the compliance by plaintiff with the mechanics' lien law.

At the trial a default was taken against Bridwell, and the cause being submitted to the court sitting as a jury, there was judgment for plaintiff. A motion in arrest of judgment was overruled, and the case comes before us by appeal, the judgment of the circuit court at special term, having been affirmed at general term.

1. The question whether a sub-contractor can, by reason of his agreement with the principal contractor, fix upon the owner of the property, with whom he has no dealings, the price of his *contract* with the sub-contractor, without reference to the *value* of the work done or materials furnished, is neatly presented by this record. Our statute gives to the contractor a lien for the price of work and labor done and materials furnished; § 1, p. 907, 2 Wagner's Stat. and the 8th section of the same statute (p. 909) enacts that the pleadings, practice, process and other proceedings in cases under this act shall be conformed to the general practice act, except as otherwise therein directed. "The petition, among other things, shall allege the facts necessary for securing a lien under this chapter, and a description of the property," etc.

It is clear that there was in the present case no compliance with this requirement. In the case of Russell v. Bell, 44 Penn. State, 47, this precise point was ruled. It was there held by Mr. Justice Strong, now of the Supreme Court of the United States, that when the lien is claimed by the sub-contractor, it is nothing to the purpose that the claimant should set forth what is due to him by the terms of his contract, omitting to state that the work done or materials furnished are reasonably worth the sum charged, and that such an account is fatally defective.

This decision is approved in Lee v. Burke, 66 Penn. State, 336, Judge Sharswood delivering the opinion of the court, and it is hardly desirable to add anything by way of comment. Our mechanic's lien law was borrowed from Pennsylvania, and while we thus adopted the Pennsylvania interpretation of that law, existing at the time of our appropriation of it, we are almost committed to any subsequent reasonable exposition of it by the same court, not conflicting with the declared views of our own judiciary. The decisions quoted are recommended by their good sense and precision.

All the judges concurring, the decision of the St. Louis Circuit Court is reversed.

Partnership Property and Debts.

KLEINE *ET AL.* v. SHANKS, EXECUTOR.

United States Circuit Court, Southern District of Mississippi, November Term, 1876.

Before Hon. R. A. HILL, District Judge.

1. Real Estate held by Partners—How held for Payment of Debts—Effect of Death of one Partner.—Real estate held by partners, either as capital stock for partnership purposes, or as purchased with partnership means, is for the purpose of paying the debts due by the partnership, or the balance due its members, considered as personal assets of the partnership; the legal title being vested in the partners as tenants in common, in trust for the creditors and members of the firm. Upon the death of one of the members, the title so vested in him descends to his heirs or devisees subject to the same trust.

2. ——. Power of Surviving Partner.—The surviving partner has the right to control and manage the estate for the purpose of satisfying the trusts which rest upon it, and he may to this end rent it, receive the rents, sell it and receive the purchase money, and convey to the purchaser not only the legal and equitable title in himself, but the equitable title which he holds as such surviving partner, and if the sale be *bona fide* the court will compel the party holding the legal title under the deceased partner to convey such legal title to the holder of the equitable title, and thereby make the title complete.

T. A. & M. Marshall, for complainants; *W. B. & A. Pittman*, for defendant.

HLIL, J.—This cause is now submitted upon defendant's demurrer to complainants' bill. The bill is necessarily lengthy, but so much of the allegations as are necessary to understand the points raised by the demurrer, are substantially as follows:

Shepherd Brown and Joseph H. Johnson, in 1853, formed a partnership in a banking and general trading business, to be conducted in the city of Vicksburg, in this state, which business was to embrace the purchase and sale of lands, and all of which was to be conducted on joint account under the firm name and style of Brown & Johnson. The business was commenced, and carried on until the commencement of the war, embracing very large transactions in all its departments. The results of the war suspended, and finally broke up and ruined, the business, ending in hopeless insolvency. Johnson died in 1863, leaving a will and testament, which has been duly proven and admitted of record, and of which the defendant is appointed executor.

The will vested in the defendant the title to all the estate of the testator, real and personal, legal and equitable, with power to continue the business or wind it up as the defendant might deem most to the interest of the estate; and when wound up, that defendant should retain the one-fourth, and distribute the remainder among certain of the testator's relations named and in the proportions stated in the will; and providing further, that if any of the beneficiaries should complain of the action of the defendant, it should forfeit his or her interest under the will. That at the close of the war, Brown, the surviving partner, found the assets of the firm wholly insolvent and insufficient to meet the liabilities of the firm, and being pressed by the creditors, not only of this firm, but of others, with which both he and Johnson were connected, thought those who had deposited their funds with the banking house at Vicksburg the more meritorious, and desired to make provision for their payment out of the wreck that remained, the principal part of which consisted of the real estate owned and held by the firm as part of the firm property. That after consulting with the defendant, who was then vested with all the title and interest which his testator had in, and to, this real estate, with as full power and disposition as the testator would have had over it if living, and with the free and full assent of the defendant. Brown as such surviving partner conveyed the real estate described in the bill to J. A. Kleine, one of the complainants, in trust for the payment of the debts due these depositors, whose names and the amounts due each were given in a schedule annexed to, and made part of, the conveyance. Power and direction were given to the trustee to sell and convey this real estate, and from time to time, as he might receive the proceeds, to apply them to the payment of these debts *pro rata*. That the trustee proceeded to sell the real estate described in the bill, which was done for a full and fair price, and the proceeds applied as directed. That the complainants who are either the original purchasers, or who hold under them went into the possession, paying taxes upon it, keeping up repairs, etc., without any claim whatever being set up to it by the defendant, until served with writs of ejectment to recover possession, brought by the defendant against them upon the law side of this court, and which action this bill seeks to enjoin, and for a decree compelling the defendant to convey to the complainants respectively all the title which defendant, as such executor and devisee, has in, and to, the real estate so respectively held by complainants. The demurrer admits the truth of the allegations of the bill as above stated.

The questions are: First, are the complainants entitled to the relief prayed for? And, if so, to what relief? They pray first, that the actions of ejectment shall be perpetually enjoined; secondly, that defendant shall convey to them all the title he holds, and if mistaken in both of these, that they be subrogated to the rights of Brown, the surviving partner, and those of the creditors.

The questions presented are important, not only in consideration of the large value of the property involved, but on account of their being of first impression in this state in some of their features. Being questions of property, the rights of the parties so far as they have been settled by the courts of last resort in the state, must control the decisions of this court upon the questions presented. The rule laid down by the supreme court of the state is as follows: Real estate held by partners, either as capital stock for partnership purposes, or as purchased with partnership means, is for the purpose of paying the debts due by the partnership, or the balance due its members, considered as personal assets of the partnership, the legal title being vested in the partners as tenants in common, in trust for the creditors and members of the firm as stated in the articles of co-partnership. And upon the death of one of the members, the legal title so vested in him descends to his heirs or devisees, who continue to hold as tenant in common with the survivors, in trust, for the payment of any balance found due upon final settlement to the survivors, according to the articles of the co-partnership. This is as far as any of the decisions have gone, and will be found recorded in Scruggs v. Blair, 44 Miss. 406; Hanway v. Robertshaw, 49 Miss. 756, and which coming before the court again at the present term, the same doctrine was re-affirmed.

The learned counsel for defendant insists that this is only a lien or right to have the partnership real estate, by proceedings in a court of competent jurisdiction, sold and the proceeds applied to the payment of the demands with which it is charged. A careful consideration of the questions presented, satisfies me that it is something more than a lien; it is a special equitable interest in the estate, and the right upon the surviving partner, who is charged with payment of the partnership debts, to control and manage it for the purpose of satisfying the trusts which the supreme court of the state has declared rests upon it; for this purpose he may rent it and receive the rents, may sell it and receive the purchase money, and convey to the purchaser, not only the legal and equitable title in himself, but the equitable title which he holds as trustee as surviving partner, and if the sale be a a fair and *bona fide* one, and for a fair consideration, such a one as a court of equity would sanction, had it been made under its own order and decree, the court will compel the party holding the legal title under the deceased partner to convey such legal title to the holder of the equitable title, and thereby make the title complete. This is the rule held in California in Dupy v. Leavenworth, 17 California, 262. Chief Justice Field, now one of the jus tices of the Supreme Court of the United States, in delivering the opinion of the court, uses this langnage: "In equity, real estate acquired with partnership funds, for partnership purposes, is regarded as personal estates, so far as the payment of partnership debts, and the adjustment of partnership rights are concerned. The real and beneficial interests which each partner possesses in this partnership property is the balance coming to him after the payment of the partnership debts, and the settlement of accounts with his co-partners. And in the view of equity it is immaterial in whose name the title to the property stands; whether in the individual name of one partner, or in the joint names of all, it is first subject to the payment of the partnership debts, and is then to be distributed among the co-partners according to their respective rights. The possessor of the legal title in such case holds the estate in trust for the purposes of the co-partnership. Each partner has an equitable

interest in the property until the purposes are accomplished. Upon the dissolution of the partnership by the death of one of the partners, the surviving partner who is charged with the duty of paying the debts can dispose of this equitable interest, and the purchaser can compel the heirs at law of the deceased partner to perfect the purchase by the conveyance of the legal title.

The same doctrine was held by the Supreme Court of Alabama, in the case of Andrews' Heirs v. Brown's Heirs, 21 Ala. 437. In that case, Chief Justice Dargan delivering the opinion of the court, in stating the rule, among other things, says: "It will not do to charge the surviving partner with the duty of paying the partnership debts, and at the same time withhold from him the means of doing so." The Supreme Court of Massachusetts, in Burnside v. Merrick, 4 Metcalf, 582, holds that this equitable interest in partnership real estate vests in the surviving partner; and that neither the widow nor heirs of the deceased partner have any beneficial interest in such real estate, or the rents and profits thereof, until the partnership debts and obligations are discharged, and that such real property must first be applied to that purpose. I have been referred to no adjudicated case in any of the states, or by the Supreme Court of the United States holding a different rule from that above stated.

I am satisfied if the rule were not as stated, defendant must be held in equity estopped from setting up title to the estate so conveyed, and compelled to convey the legal title he holds, as such devisee, to the complainants.

The doctrine of equitable estoppel is now so well settled that reference to authority to maintain it is unnecessary, and was, perhaps, never more clearly stated than by Chief Justice Simrall, a few days since, in the case of Ragsdale v. Railroad Company, in which it was held that a verbal agreement to convey lands, sustained by a valuable consideration acquiesced in and acted upon for a considerable time, until the land had been sold and conveyed to others by the party to whom the conveyance was agreed to be made, estopped the party so agreeing to convey from setting up his title; and that a court of equity will compel him to convey the legal title under the estoppel, and thereby complete the title.

Having arrived at the conclusion stated, it is unnecessary to consider the doctrine of subrogation, so ably combatted by defendant's counsel, as applied to the facts stated in the bill. I am compelled, both from reason and authority, to the conclusion that the demurrer must be overruled, and it is so ordered. DEMURRER OVERRUEED.

Eminent Domain.

QUARLES v. MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY *ET AL.*

Supreme Court of Missouri, October Term, 1876.

Hon. T. A. SHERWOOD, Chief Justice.
" DAVID WAGNER,
" WM. B. NAPTON,
" WARWICK HOUGH,
" E. H. NORTON,
} Judges.

In a proceeding to condemn land for the right of way of the Tebo and Neosho Railroad, three commissioners were appointed, one of whom declined to act; the other two proceeded to assess damages and make a report, which was confirmed by the circuit court, without objection. In an action of ejectment by the owner of the fee against the railroad company and its lessee, *Held*, (1.) That the failure of one of the commissioners to act, at most would constitute an irregularity merely, and that the report after confirmation would not be subject to collateral attack on that ground; (2.) That a majority of the commissioners were authorized to act, and that hence the assessment and report was regular and valid. Wood v. Phelps County Court, 28 Mo. 119, distinguished.

Appeal from the Randolph Circuit Court.

Ejectment to recover a tract of land upon which defendants' railroad had been constructed. Proceedings to condemn had been instituted, resulting in a judgment vesting its right of way over the land in the Tebo & Neosho Railroad Company. It was contended by the plaintiff, that the judgment of condemnation was void, for the reason that one of the three commissioners appointed to view the land and award damages failed and refused to act. There was judgment for the defendants, and the plaintiff appealed.

NORTON, J., delivered the opinion of the court.

[After stating the facts at length]. It is urged by counsel for plaintiff, that the report of the commissioners being signed by two of them only, was a nullity, and that the judgment of the court rendered thereon was void, and that the court below erred in receiving them as evidence.

As this action of the court is the material point in the case, and is decisive of all other questions raised, our attention will be directed chiefly to it.

The law under which the proceeding to condemn plaintiff's land was instituted, provides, that if the owner of land through which a railroad shall pass, shall refuse to relinquish the right of way, or make a voluntary conveyance to the company, the facts of the case shall be stated to the judge of the circuit court of the county in which the land is situated, and said judge shall appoint three disinterested citizens of the county in which the lands are situated, who shall view the land, assess the damages, and report under oath the amount assessed with a plat of the land condemned. It further provides, that if objections are filed within ten days after filing the report, they shall be examined by the judge or court, and if sustained, other commissioners shall be appointed till a report is confirmed, and if overruled or no objections are filed in the time prescribed, the court may enter judgment vesting title to the land in the company, and requiring payment to the land-owner of the damages assessed.

It is not pretended in this case that plaintiff did not receive the notice required to be given him, nor that the petition asking for the appointment of commissioners failed to state any fact necessary to confer the power on the judge or court, to proceed in regard to the subject-matter of the petition.

The allegations made in the petition that the owner had refused to relinquish the right of way, or make a voluntary conveyance, and that five days' notice had been given previous to its presentation, brings it within the principle of the decisions to which we have been referred by plaintiff's counsel, viz.: 44 Mo. 542; Shaffner v. City of St. Louis, 31 Mo. 272; Leslie v. City of St. Louis, 47 Mo. 474; Ells v. Pacific Railroad Company, 51 Mo. 200. The only question decided in the cases referred to, was, that notice and refusal of owner to relinquish right of way were jurisdictional facts, and that unless they affirmatively appeared, the court would be powerless to proceed, both for want of jurisdiction of the person and subject-matter, and that a judgment entered in a case where these facts did not appear, such judgment would be void. In this case no such question arises, for the notice of the proceeding which was given to the plaintiff conferred jurisdiction of the person, and the facts stated in the petition for the appointment of commissioners, were sufficient to give the court jurisdiction of the subject-matter. If, after the judge had thus acquired jurisdiction both of the person and subject-matter, he had appointed three citizens of Randolph county, where the land is situated, two of whom were interested and one disinterested (the law requiring all them to be disinterested), could the plaintiff attack the judgment which might afterwards be rendered on their report in a collateral proceeding? We apprehend not.

The action of the court in the appointment of such commissioners would be simply irregular and erroneous, and a judgment rendered on a report made by them, could not be assailed in a collateral proceeding. The report of the commissioners in this case, though only signed by two of the three, was sufficient to authorize the court to render the judgment upon it which was rendered. It purports on its face to be the report of the commissioners, and the court properly so regarded it.

The question of the sufficiency of the report is disposed of, and the objection which plaintiff now makes, is answered by section 6 Wag. Stat. 887. This section provides, "that the construction of all statutes of this state shall be by the following rules, unless such construction be plainly repugnant to the intent of the legislature, or context of the same statute." "Words importing joint authority to three or more persons, shall be construed as authority to a majority of such persons, unless otherwise declared in the law giving such authority."

Applying this rule of construction without regard to the question as it is at common law, or as it may have been decided by the different courts in the different states, to the statute authorizing the appointment of the commissioners to condemn land for a public purpose, and the whole subject is relieved of all difficulty.

What is the joint authority conferred on the three commissioners? It is to view the land, assess the damages, and make report. It is not expressed in the statute that all of them shall join in the view of the land, the assessment of the damages or in making the report, and therefore, according to the rule of construction laid down by the legislature, any two of them might act and perform all these duties, unless such a construction would not only be repugnant but plainly repugnant to the intention of the legislature in requiring them to be appointed. We can perceive no such repugnancy. The intention of the legislature in designing three as the number to be appointed, was doubtless to secure a majority decision, which might not be secured by the appointment of two or four, and if two did qualify, meet, act, and concur, the intention would be effectuated. This same rule of construction was applied by the court, in the case of Moore v. Wingate, 53 Mo. 398, to the statute regulating sales of real estate by an administrator. In such cases the statute provides, that before an executor or administrator can sell real estate, he shall have it appraised by three disinterested householders of the county, who shall view and appraise the estate, and deliver under oath a certificate of appraisement. In the above case, it appeared that the report of appraisement was made by only two of the appraisers, and this court held that under the rule of construction prescribed by the legislature, that the report was sufficient.

The language used by the legislature in requiring three appraisers to view, appraise and report, is the same in its terms as the language employed in the act requiring three commissioners to be appointed to view, assess damages, and report, in proceedings to condemn land for railroad purposes.

In opposition to this view, we have been referred to Wood v. Phelps County Court, 28 Mo. 119. The sole question in that case before the court was, whether an appeal would lie from an order of the county court confirming the report of two commissioners to locate the county seat of Phelps county, which was made under a law of the legislature, constituting three persons, named therein, as a board to locate said county seat.

This law contained a provision that a majority should be sufficient to locate the county seat, and the further provision that, should one or more fail to act, the county court of the county where the delinquent resided might supply the vacancy by appointing another. It appeared in the case that one of the commissioners failed to qualify and act, and that the other two proceeded to locate the county seat and make their report, which was confirmed by an order of the county court; that afterwards Wood and others filed a petition objecting to the action of the

commissioners in locating the county seat, and asking the court to make an order removing it, and also for the appointment of five commissioners to select another site.

The record shows that the county court made the following order: "Now on this day come the petitioners and present their motion to the county court for an investigation of the alleged illegality of the location of the county seat of Phelps county," which motion was by the court overruled, whereupon petitioners gave notice of appeal, and thereupon an appeal was taken to the circuit court. The appeal was dismissed by the circuit court, and an appeal taken from that court to this court.

It is manifest that the only point before the court for decision was whether in such cases, an appeal under the law could be taken, and the court decided that it could not, and affirmed the judgment of the circuit court in dismissing it.

After thus disposing of the case, it is added, that "the report of the two commissioners should have been rejected, and that the county court ought to vacate the order." The reason assigned in the opinion is, that "although the statute permitted a majority to locate the county seat, it contemplated that all should meet and confer, because it expressly provides that in case one or more of them resigns, the county court of the county wherein the delinquent resided, shall supply his place by appointing another." It thus appearing on the face of the statute, according to the dicta of the judge construing it, that the legislature intended that all should meet and confer, but that a majority might report the result of the conference, that rule was announced as the rule which should govern that case. But in the statute we are considering there are no such words used expressive of any such intention on the part of the legislature, and, therefore, the legislative rule of construction as laid down in Wag. Stat. sec. 6, 887, must be applied. It might with equal propriety have been said in the case of Wood v. Phelps County Court, that the object of the legislature in authorizing a vacancy to be filled, was to prevent a tie vote of the commissioners as to the location of the county seat.

Besides this, in disposing of the question, the court says, the county court ought to set aside the order of the court approving the report of the commissioners, thus clearly indicating that the order of the county court was not void, but simply erroneous or irregular. We can not, in order to take the statute authorizing the appointment of three commissioners to condemn land for a public purpose, give to it so forced and strained a construction as to say that the legislature enacting it plainly intended that all three of them should meet and confer before a majority could report. We think there was no error committed by the court below in receiving the evidence. The other judges concurring,

JUDGMENT AFFIRMED.

Life Insurance—Non-Payment of Premium Notes.

BONNER v. NORTHWESTFRN MUTUAL LIFE INSURANCE COMPANY.*

Superior Court of Cincinnati.

1. Case in Judgment—Default in Payment—Plaintiff's Right to Recover.—A policy of life insurance for the sum of $5,000 on the ten year plan, was delivered to the insured in consideration of the sum of $136.75 in cash paid, and of an annual premium note of $91, and an annual cash premium of $136,75 to be paid yearly thereafter during the first ten years of the continuance of the policy, the company promising to pay the said sum of $5,000 within ninety days after notice and proof of death of the insured, deducting therefrom the balance of the year's premium, and all notes given for premiums if any. It was stipulated in the policy that, if default was made in the payment of any premium, or in the payment of interest on any premium note, the company would pay as many tenth parts of the $5,000, as there had been paid complete annual premiums at the time of the default. It was admitted that the assured had paid six annual cash payments of $136.75 each, and given six annual notes of $91 each, which notes were a lien on the policy, and had annually paid the interest on all the notes, except on the last, and that when it fell due he refused to pay the interest, and made no further payments of the kind, and gave no other notes. It was further admitted that the dividends of the profits of the company had paid and cancelled the first two of the premium notes, and that as to the other four, the company had ceased to declare dividends for the years which such four notes in part represented. Three years after the last payment of interest the assured died. In an action on the policy by the widow, she claimed that she had made six payments of complete annual premiums, and was therefore entitled to recover six-tenths of $5,000 the original sum insured, deducting therefrom the unpaid notes. It was claimed by the defendant that only two complete annual premiums had been paid, and that the plaintiff was only entitled to recover two-tenths of the said original sum. *Held*, that neither the policy, nor the premium notes fixed any time for the payment of the notes, and that it was not contemplated that the notes should be paid during the life of the assured otherwise than by the application of dividends of the profits of the company; that during the life of the assured at least, the notes were taken in satisfaction of the part of the premium which they represented, and that, therefore the payment of $136.75 in cash, and the delivery of the premium note for the balance of the year's premium, constituted the payment of a complete annual premium, and that the plaintiff was entitled to recover six-tenths of the whole amount insured, less the unpaid premium notes.

2. Company not Entitled to Interest on Unpaid Notes.—That the company was not entitled to interest on the unpaid notes from the time the assured ceased to pay interest and up to the time of his death, because by the rules of the company, dividends were not allowed for the years represented by the notes after the interest thereon ceased to be paid, and such dividends in this case would have amounted to more than the unpaid interest.

Opinion by O'CONNER, J.

J. B. Mannix, attorney for plaintiff; *Sayler & Sayler*, attorneys for defendant.

*From the Cincinnati Law Bulletin.

This case was reserved for decision here on the evidence presented at special term.

The defendant is a corporation under the laws of the state of Wisconsin, having a place of business and agents in the city of Cincinnati.

The petition states "that on the 27th day of October, 1865, the defendant, by its policy of insurance of that date, in consideration of the sum of $136.75 to it paid by Mary Bonner, sister of Stephen P. Bonner, and of an annual premium note of $91, and an annual cash premium of $136.75 to be paid yearly thereafter during the first ten years of the continuance of said policy, did insure the life of said Stephen P. Bonner, of Cincinnati, Ohio, in the sum of $5,000, for the term of life, for the sole use of the said Mary Bonner; and did thereby agree with the said assured to pay the said sum to the said Mary Bonner or her executors, administrators or assigns, in ninety days after due notice and proof of the death of said Stephen P. Bonner, deducting therefrom the balance of the year's premium, and all notes given for premium, if any." The policy contains this clause: "And the said company further promise and agree that if default shall be made in the payment of any premium, they will pay as above agreed, as many tenth parts of the original sum insured as there shall have been complete annual premiums paid at the time of such default." And this further clause: "That if the said premiums or the interest on any note given for premiums, shall not be paid on or before the days mentioned for the payment thereof, at the office of the company, or to agents when they produce receipts signed by the president or secretary, then in every such case the company shall not be liable for the payment of the whole sum assured, and for such part only as is expressly stipulated above."

These are the only parts of the policy material to the question which has been presented to us for decision.

In 1867, Mary Bonner assigned her interest in the policy to the plaintiff, Anna M. Bonner, at that time the wife of Stephen P. Bonner. It is alleged in the petition, and admitted in the answer, "that during the first six years of the existence of said policy, namely, from the 27th day of October, 1865, until the 27th day of October, 1871, the said yearly premiums and the interest upon all notes given for premiums were regularly paid, and that on the 27th day of October, 1871, there was default in payment of premium and no further payments have since been made," "and that on the 22d day of December, 1874, the said Stephen P. Bonner died." The petition further alleges that at the time of the death of Stephen P. Bonner, the policy, under its terms, was in force to the extent of six-tenths of the original sum insured, and the plaintiff asks judgment for $3,000, being six-tenths of $5,000, the original sum insured, and for interest. The defendant denies that at the time of the death of Stephen P. Bonner, the policy was in force to the extent of six-tenths of $5,000, and claims that it was in force to the extent of only two-tenths of $5,000, because, as the defendant alleges, at the time of said death and at the time of said default, only two complete annual payments had been made by the assured. It is admitted by the defendant that, by the terms of the policy, the plaintiff is entitled to recover as many tenth parts of the sum of $5,000 as there were complete annual premiums paid at the time of the default in October, 1871; and the only question we are called on to answer is, what, under the policy, constitutes a complete annual premium, or what constitutes the payment of a complete annual premium.

As we have stated, it is admitted by the defendant that, during the first six years of the existence of the policy, the annual cash payments of $136.75 were made, and an annual premium note, making six notes for $91 each, was regularly given, and that the annual interest on these notes, at the rate of seven per cent. was regularly paid, except on the last note, which was given in October, 1870, the interest on which became due in October, 1871, and the interest on which was not paid. These promissory notes were all in the following form. We give the first:

"$91. MILWAUKEE, WIS., October 27th, 1865.

"For value received, I promise to pay to the Northwestern Mutual Life Insurance Company ninety-one dollars, with interest at the rate of seven per cent. per annum, which interest shall be paid annually, or the policy be forfeited. This note being given for part of the premium on policy No. 13,161, is to remain a lien upon said policy until it becomes due by limitation, or by the death of Stephen P. Bonner, of Cincinnati, when the note shall be deducted from the said policy, unless sooner paid. The dividends on the policy are to de applied to the payment of the notes.

"(Signed) STEPHEN P. BONNER."

It is to be observed that no time is fixed in these notes when they shall become due, and that it is not contemplated, either in the policy or in the notes, that, during the life of the assured, they shall be paid otherwise than by the application of dividends of profits, and if not so paid during the life of the assured, then they are tc be deducted from the policy on final settlement. The notes do provide that if the interest on the notes is not promptly paid, the policy shall be forfeited. But there is no such provision in the policy itself, and it is clear that by the word "forfeiture" in the notes, nothing else was intended than what is expressed in the policy, namely, that if the interest is not promptly paid, the company shall only be liable for as many tenth parts of the $5,000 as there have been complete annual premiums prid. The policy, by its terms, was delivered in consideration of the sum of $136.75 then paid, and of an annual premium note of $91, and an annual cash premium of $136.75 to be paid yearly thereafter during the first ten years of the continuance of said policy; and if the assured complies with these conditions, the company promises to pay $5,000 on the death of the assured, "deducting therefrom the balance of the year's premium, and all

notes given for premiums, if any." It is further stipulated that if default shall be made in the payment of *any premium*, the company shall pay as above agreed as many tenth parts of the sum of $5,000 as there shall have been complete annual premiums paid at the time of such default. And it is also further stipulated that if the said premiums or the interest on any note given for premiums shall not be paid on or before the days mentioned for the payment thereof, then in every such case the company shall not be liable for the payment of the whole sum assured, and for such part only as is expressly stipulated above. The only difference between these two stipulations is that the first makes provision in case of non-payment of premium, and the second makes provision in case of non-payment of *interest* on premium notes, but neither stipulation contemplates the payment of the notes otherwise than as expressed in the notes themselves, that is, by the application of dividends, or, as expressed in the policy, by deducting the amount of the unpaid notes from the amount due on the policy on the death of the assured, and the stipulations, taken together, provide that, whether the premium be not paid, or whether the interest on the notes be not paid, still the company will pay as many tenth parts of $5,000 as there have been complete annual premiums paid.

It is contended by the defendant that, under this policy, a complete annual premium is the sum of $227.75, being the amount of the annual cash payment of $136.75 and the promissory note for $91, and that until the note has been paid, either by the application of the dividends or in cash by the assured during his life, the company has not received a complete annual premium, and that at the time of default in payment of further premium or interest, only the first two of the six notes given for the balance of the annual premium had been paid, and these had been paid by the dividends of the earnings of the company, and that, therefore, nothing having been paid thereafter, only two complete annual premiums had been paid, and consequently there was due on the policy, at the death of the assured, only two-tenths of $5,000, the original sum insured. The plaintiff, on the other hand, contends that the payment of $136.75 in cash, and the giving of a note for $91 for the balance of the premium, constitute, under the terms of this policy, a complete annual premium, and these cash payments having been made annually for six years, and notes given annually for the same six years, that six complete annual premiums have been paid, and that therefore there is now due on the policy six-tenths of the original amount insured, that is, six tenths of $5,000, which would be $3,000, from which is to be deducted the amount of the four notes remaining unpaid at the time of the death of Stephen P. Bonner.

The question then resolves itself into this: To what extent, if any, were the premium notes received by the company in satisfactian of the balance of unpaid annual premium? It is true, as a general proposition, that the delivery and receipt of a note does not discharge the debt for which the note is given, unless such is the agreement of the parties, and the note is received in satisfaction of the debt. It is clear, in this case, that the premium promissory notes were not received by the company in full satisfaction of the unpaid premium which they represented, because it is stipulated in the policy that if, at the death of the assured, any note remain unpaid, its amount shall be deducted from the sum to be paid to the beneficiary; but it is also clear that such notes were taken in satisfaction of the balance of the annual premium unpaid, so long, at least, as the insured lived: First, because during his life no time was fixed for their payment; and secondly, because no provision was made for their payment in any way during his life, except by the application of the dividends of the profits of the company, and if such dividends were not sufficient to cancel any of such notes, the company could not legally enforce their payment by the assured, nor could the assured compel the company to receive from him cash for the notes, because the notes were a lien on the policy, drawing seven per cent. interest, and the company had the right to retain this investment rather than to receive payment of the notes otherwise than by dividends during the life of the insured. The contract, then, between the parties was that no further cash payment than that of the $136.75 annually was to be made by the assured, except the interest on the annual premium notes.

What, then, was the effect, under the contract, of the refusal of the plaintiff to pay further interest after the expiration of the first six years? So far as we know the history of the business of the company from the evidence, such refusal was a benefit and a profit to the company. This was a mutual insurance company, in which every policy-holder was entitled to share in the profits of the business. Dividends were declared annually, triennially, or every five years, at the discretion of the managers. The dividends on this policy, as shown by the testimony, very much exceeded the interest on the premium notes. Before the expiration of the first six years, these dividends were sufficient to cancel the first and second notes and part of the third, amounting to about $250, while the interest due and paid on all the notes was only about $100. By the construction which the company put on the policy, and according to which it conducted its business, and which construction we may assume was the correct one, whenever there was a failure to pay interest on any premium note, the policy-holder was not entitled to any dividend for the year represented by such note, either on the note or on the cash payment of $136.75 for that year. So that in October, 1871, when Dr. Bonner refused to pay further interest on the outstanding notes, the company ceased to credit him with any further dividends except upon the payments of the two years represented by the first and second notes, which had been canceled, and as to which years it was therefore admitted he had made payment of complete premiums, and except also upon the payment of part of the year represented by the third note, which the dividends had also partly canceled.

It appears, then, that the only effect of the refusal to pay further interest was the forfeiture of the benefit of future dividends, and in no way affected the question as to how many complete annual premiums had been paid, or what constituted a complete annual premium. It was clearly at the option of the insured whether he would avail himself of the benefit of dividends by the payment of interest, as it was clearly at his option, at any time within the ten years of the policy, to decline to pay further annual premiums or give annual premium notes, in which case he would still be entitled to as many tenth parts of the original amount insured as he had paid annual premiums and given annual premium notes, the notes unpaid by dividends at his death to be deducted from the policy. The claim of the company is that, until the outstanding premium notes are paid by dividends (and there is no other way by which either party could enforce their payment during the life of the assured), the annual interest on such notes must be paid, or, so far as they represent the annual premium, no complete annual premium has been paid. We think it sufficient to say that we can find no such contract in the policy, nor in the body of the premium note. If such was the contract, and the assured had lived his expectancy of life, say for thirty years after he ceased to pay interest, and the affairs of the company had been such that during these thirty years it had been unable to declare dividends, the result would be that during the life of the insured it could never be determined, as to the unpaid notes, whether a complete annual premium had been or would be paid.

We do not think the contract between the parties will bear such a construction. Nor can we see that the construction we give to the contract works any hardship to the company. The business of life insurance is necessarily conducted on the theory and on the fact as derived from experience, that the average number of the insured will live their expectancy of life. In the present case the expectancy of the insured's life, was about thirty years from the time he ceased to pay interest on the premium notes. He had up to that time, paid to the company in cash premiums and interest on premium notes $916, this sum invested even at simple interest, for thirty years at seven per cent., would have produced principal and interest, $2,889. The amount due under this policy, in the view we have taken, is $3,000 less the amount of the four unpaid promissory notes for $91 each, which would be $364, which deducted from $3,000 leaves $2,636 due to the insured at the time of his death, which is $203 less the than the amount he had paid the company, with simple interest at seven per cent for thirty years. The company, however, receives compound interest on its investments, which would yield a very much larger sum, and far exceed the dividends to which the insured in this case, would have been entitled for thirty years, had he lived so long, on the two complete annual premiums, which it is admitted have been paid. If then, the assured had lived his expectancy of life, the view we have taken of the contract between the parties, would have afforded the company a large profit on the policy. That the insured did not live his expectancy of life, is the very risk the company took, and the loss in this particular case, is more than compensated by the gain derived from the average of risks where the expectancy of life is realized.

We hold, therefore, that the payment of the annual cash premium of $136.75, and the delivery of a premium note of $91 for the balance of the annual premium of $227.75, constituted under this policy a complete annual premium, and as it is admitted that six such payments were made, and six such notes given, it follows that the plaintiff is entitled to recover six-tenths of the original sum insured, or the sum of $3,000, with interest to commence to run ninety days after the company was furnished with notice and proof of the death of the assured, from which is to be deducted so much of the four premium notes as remained unpaid at the death of Stephen P. Bonner. And for this sum, we give judgment for the plaintiff. We allow no interest to the defendant on the notes unpaid at the time the assured ceased to pay interest; because from that time to the time of his death, the company, under its rules and under its construction of the policy, cut him off from the benefit of dividends as to four-tenths, as we have before explained. If the company were entitled to interest on these unpaid notes, under its own rules the plaintiff would be entitled to dividends, on the four-tenths in part represented by the notes, which, as we have shown, would be more than the interest. But whether as to some years of the company's business this would be so or not, we are satisfied to adopt the construction of the policy acted on by the company on the subject of dividends.

In an action on a policy of this same company, the policy being issued the same year, and being precisely the same as this, the Supreme Court of Iowa, in the case of Ohde v. The Northwestern Mutual Life Insurance Company, 40 Iowa, 357, held, "that the payment of the principal of the premium notes, was not necessary to constitute with cash premiums and the payment of interest, 'the complete annual premiums,' upon which payment by the company was made conditional." In this case also the assured had failed to pay the interest due on the last premium note, and the notes remained unpaid to the time of his death, and he made no further payments. The court further held, "that when the assured had made the cash payments, executed and delivered his note for the balance of the premium, and paid the interest due on the *previously* executed note or notes, then a 'complete annual premium' was paid. This the assured performed for two years, which entitled his widow upon his death, to two-tenths parts of the whole sum named in the policy, deducting therefrom the amount of the two premium notes, and their accrued interest."

In the case cited it does not appear that the court had any evidence that where interest remained unpaid, the assured was deprived of the benefit of dividends, and, therefore, the court allowed interest to the company on the unpaid notes. But, for the reason we have stated, the

payment of interest necessarily entitles the assured to the benefit of the dividends, and the company can not claim interest, and at the same time deprive the plaintiff of accruing profits. This is the only case to which we have been cited which bears fully on the case before us. Counsel on both sides, in elaborate arguments, referred to many authorities bearing on the subjects of forfeiture, and conditions precedent and subsequent. But we do not see that these authorities elucidate the question we have decided. The question of a forfeiture does not arise on this policy in this case. On the facts admitted the assured could not work a forfeiture of any kind, unless it be as to dividends, by refusing to pay further premiums or interest, or the refusal to give other premium notes. It was at his option to avail himself of the terms of the policy for the ten years, or for any shorter period, and when he declined to make any further payments, or to give other notes, he was entitled to the legal benefits under the policy, of the payments he had already made, and of the premium notes he had already given.

Judgment as above indicated is given for the plaintiff.

Bankrupt Law.

CLAFLIN v. HOUSEMAN, ASSIGNEE.

Supreme Court of the United States, October Term, 1876.

1. Jurisdiction of Federal Courts not Exclusive.—Under the Bankrupt act of 1867, the assignee might sue in the state courts to recover the assets of the bankrupt, no exclusive jurisdiction being given to the courts of the United States. Whether such exclusive jurisdiction is given by the Revised Statutes *quere*.

2. ——. Extent of Federal Laws.—The laws of the United States are as much the law of the land in any state as state laws are; and although, in their enforcement, exclusive jurisdiction may be given to the federal courts, yet where such exclusive jurisdiction is not given, or necessarily implied, the state courts, having competent jurisdiction in other respects, may be resorted to. In such cases the state courts do not exercise a new jurisdiction conferred upon them, but their ordinary jurisdiction, derived from their constitution under the state law.

In error to the Supreme Court of the state of New York.

Mr. Justice BRADLEY delivered the opinion of the court.

This action was brought in May, 1872, in the New York Supreme Court, county of Kings, by Julius Houseman, as assignee in bankruptcy of Comstock and Young, against Horace B. Claflin, under the 35th section of the Bankrupt Act, to recover the sum of $1,935.57 (with interest), being the amount collected by Claflin on a judgment against the bankrupts, recovered within four months before the commencement of proceedings in bankruptcy. The ground of the action, as stated in the complaint, was, that they (the bankrupts) suffered the judgment to be taken by default, with intent to give Claflin a preference over their other creditors, at a time when they were insolvent, and when he knew, or had reasonable cause to believe that they were insolvent, and that the judgment was obtained in fraud of the bankrupt law. The defendant demurred to the complaint, assigning as cause, first, that the court had no jurisdiction of the subject of the action; secondly, that the complaint did not state facts sufficient to constitute a cause of action. Judgment was rendered for the plaintiff on the 13th day of January, 1873, and was subsequently affirmed, both by the general term of the supreme court and by the court of appeals. This judgment is brought here by writ of error under the act of 1867, which supersedes the 25th section of the judiciary act.

The point principally relied on by the plaintiff in error is, that an assignee in bankruptcy can not sue in the state courts. It is argued that the cause of action arises purely and solely out of the provisions of an act of Congress, and can only be prosecuted in the courts of the United States, the state courts having no jurisdiction over the subject. It is but recently settled that the several district and circuit courts of the United States have jurisdiction, under the bankrupt law, of causes arising out of proceedings in bankruptcy pending in other districts. There had been much doubt on the subject, but it was finally settled at the last term of this court in favor of the jurisdiction. Lathrop v. Drake, 91 U. S. Rep. 516. Had the decision been otherwise, as for a long period was generally supposed to be the law, assignees in bankruptcy, if the position of the plaintiff in error is correct, would have been utterly without remedy to collect the assets of the bankrupt in districts other than that in which the bankruptcy proceedings were pending. Neither the state courts nor the federal courts could have entertained jurisdiction. The Revised Statutes, whether inadvertently or not, have made the jurisdiction of the United States court exclusive in "all matters and proceedings in bankruptcy." Sec. 711. Whether this regulation will or will not affect the cognizance of plenary actions and suits, it is not necessary now to determine. At all events, the question of such cognizance must be met in this case, and being important in the principles involved, would require much deliberate consideration, had it not been already in effect decided by the court.

In the opinion of the court in Lathrop v. Drake, it was taken for granted and stated that the state courts had jurisdiction (p. 518); but as the question was not directly involved in that case, it was more fully considered in Eyster v. Gaff, 91 U. S. R. 521, and it was there decided that a state court is not deprived of jurisdiction of a case by the bankruptcy of the defendant, but may proceed to judgment without noticing the bankruptcy proceedings if the assignee does not cause his appearance to be entered, or proceed against him if he does appear. If there were any thing in the constitution to incapacitate the state courts from taking cognizance of causes after the bankruptcy of the parties, as the constitutional argument of the plaintiff in error supposes, the proceedings in bankruptcy would *ipso facto* determine them. But on this subject, in Eyster v. Gaff, the court say: "It is a mistake to suppose that the bankrupt law avoids of its own force all judicial proceedings in the state or other courts, the instant one of the parties is adjudged a bankrupt. There is nothing in the act which sanctions such a proposition." Again, "the debtor of a bankrupt, or the man who contests the right to real or personal property with him, loses none of those rights by the bankruptcy of his adversary. The same courts remain open to him in such contests, and the statute has not divested those courts of jurisdiction in such actions. If it has, for certain classes of actions, conferred a jurisdiction for the benefit of the assignee in the Circuit and District Courts of the United States, it is concurrent with, and does not divest that of the state courts." (Pp. 525, 526.)

The same conclusion has been reached in other courts, both federal and state, which hold that the state courts have concurrent jurisdiction with the United States courts of actions and suits in which a bankrupt or his assignee is a party. See Samson v. Burton, 4 Bank. Reg. 1; Payson v. Dietz, 8 id. 198; Gilbert v. Priest, id, 159; Stevens v. Mechanics' Savings Bank, 101 Mass. 109; Cook v. Whipple, 55 N. Y. 150; Brown v. Hall, 7 Bush, 66; Mays v. Man. Nat. Bank, 64 Penn. St. 74. There are contrary cases, it is true, as Brigham v. Claflin, 31 Wis. 607; Voorhees v. Frisbie, 25 Mich. 476, and others; but we think that the former cases are founded on the better reason.

The assignee, by the 14th section of the Bankrupt Act (R. S., § 5046), becomes invested with all the bankrupt's rights of action for property, and actions arising from contract, or the unlawful taking or detention of, or injury to property, and a right to sue for the same. The actions which lie in such cases are common-law actions, ejectment, trespass, trover, assumpsit, debt, etc., or suits in equity. Of these actions and suits the state courts have cognizance. Why should not an assignee have power to bring them in those courts as well as other persons? Aliens and foreign corporations may bring them. The assignee simply derives his title through a law of the United States. Should not that title be respected by the state courts?

The case is exactly the same as that of the Bank of the United States. The first bank, chartered in 1791, had capacity given it "to sue and be sued . . . in courts of record, or any other place whatsoever." It was held in The Bank v. Deveaux, 5 Cranch, 61, that this did not authorize the bank to sue in the courts of the United States without showing proper citizenship of the parties in different states. The bank was obliged to sue in the state courts. And yet here was a right arising under a law of the United States, as much so as can be affirmed of a case of an assignee in bankruptcy. The second bank of the United States had express capacity "to sue and be sued in all state courts having competent jurisdiction, and in any Circuit Court of the United States." In the case of Osborn v. The Bank, 9 Wheat. 738, 815, it was objected that Congress had no authority to enable the bank to sue in the federal courts merely because of its being created by an act of Congress. But the court held otherwise, and sustained its right to sue therein. No question was made of its right to sue in the state courts.

Under the bankrupt law of 1841, with substantially the same provisions on this subject as the present law, it was held that the assignee could sue in the state courts. *Ex parte Christie*, 3 How. 318, 319; Nugent v. Boyd, id. 426; Wood v. Jenkins, 10 Metc. 583.

Other analogous cases have occurred, and the same result has been reached, the general principle being, that where jurisdiction may be conferred on the United States courts, it may be made exclusive, where not so, by the constitution itself; but if exclusive jurisdiction be neither express nor implied, the state courts have concurrent jurisdiction whenever, by their own constitution, they are competent to take it. Thus, the United States itself may sue in the state courts, and often does so. If this may be done, surely, on the principle that the greater includes the less, an officer or coporation created by the United States authority may be enabled to sue in such courts. Nothing in the constitution, fairly considered, forbids it.

The general question whether state courts can exercise concurrent jurisdiction with the federal courts in cases arising under the constitution, laws and treaties of the United States, has been elaborately discussed, both on the bench and in published treatises, sometimes with a leaning in one direction, and sometimes in the other, but the result of these discussions has, in our judgment, been, as seen in the above cases, to affirm the jurisdiction where it is not excluded by express provision, or by incompatibility in its exercise, arising from the nature of the particular case.

When we consider the structure and true relations of the federal and state governments, there is really no just foundation for excluding the state courts from all such jurisdiction.

The laws of the United States are laws in the several states, and just as much binding on the citizens and courts thereof as the state laws are. The United States is not a foreign sovereignty as regards the several states, but is a concurrent, and, within its jurisdiction, paramount sovereignty. Every citizen of a state is a subject of two distinct sovereignties, having concurrent jurisdiction in the state—concurrent as to place and persons, though distinct as to subject-matter. Legal or equitable rights acquired under either system of laws may be enforced in any court of either sovereignty, competent to hear and determine such kind of rights, and not restrained by its constitution in the exercise of such jurisdiction. Thus, a legal or equitable right acquired under state laws may be prosecuted in the state courts, and also, if the parties reside in different states, in the federal courts. So rights, whether legal or equitable, acquired under the laws of the United

States, may be prosecuted in the United States courts, or in the state courts competent to decide rights of the like character and class, subject, however, to this qualification: that where a right arises under a law of the United States, Congress may, if it see fit, give to the federal courts exclusive jurisdiction. See remarks of Mr. Justice Field in The Moses Taylor, 4 Wall. 429, and Story, J., in Martin v. Hunter's lessee, 1 Wheat. 334; and of Mr. Justice Swayne, in *Ex parte* McNeil, 13 Wall. 236. This jurisdiction is sometimes exclusive by express enactment, and sometimes by implication. If an act of Congress gives a penalty to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in a state court. The fact that a state court derives its existence and functions from the state laws is no reason why it should not afford relief, because it is subject also to the laws of the United States, and is just as much bound to recognize these as operative within the state as it is to recognize the state laws. The two together form one system of jurisprudence which constitutes the law of the land for the state; and the courts of the two jurisdictions are not foreign to each other, nor tobe treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent. The disposition to regard the laws of the United States as emanating from a foreign jurisdiction is founded on erroneous views of the nature and relations of the state and federal governments. It is often the cause or the consequence of an unjustifiable jealousy of the United States government, which has been the occasion of disastrous evils to the country.

It is true, the sovereignties are distinct, and neither can interfere with the proper jurisdiction of the other, as was so clearly shown by Chief Justice Taney in the case of Ableman v. Booth, 21 How. 506; and hence the state courts have no power to revise the action of the federal courts, nor the federal the state, except where the federal constitution or laws are involved. But this is no reason why the state courts should not be open for the prosecution of rights growing out of the laws of the United States, to which their jurisdiction is competent, and not denied.

A reference to some of the discussions to which the subject under discussion has given rise may not be out of place on this occasion.

It was fully examined in the 82d number of *The Federalist* by Alexander Hamilton with his usual analytical power and far-seeing genius; and hardly an argument or a suggestion has been made since which he did not anticipate. After showing that exclusive delegation authority to the federal government can arise only in one of three ways, either by express grant of exclusive authority over a particular subject; or by a simple grant of authority with a subsequent prohibition thereof to the states; or, lastly, where an authority granted to the Union would be utterly incompatible with a similar authority in the states, he says that these principles may also apply to the judiciary as well as the legislative power. Hence he infers that the state courts will retain the jurisdiction they then had unless taken away in one of the enumerated modes. But as their previous jurisdiction could not by possibility extend to cases which might grow out of, and be peculiar to, the new constitution, he considered that, as to such cases, Congress might give the federal courts sole jurisdiction. "I hold," says he, "that the state courts will be divested of no part of their primitive jurisdiction, further than may relate to an appeal; and I am even of opinion that in every case in which they were not expressly excluded by the future acts of the national legislature, they will, of course, take cognizance of the causes to which those acts may give birth. This I infer from the nature of judiciary power, and from the general genius of the system. The judiciary power of every government looks beyond its own local or municipal laws, and in civil cases lays hold of all subjects of litigation between parties within its jurisdiction though the causes of dispute are relative to the laws of the most distant part of the globe. . . . When, in addition to this, we consider the state governments and the national governments, as they truly are, in the light of kindred systems, and as parts of ONE WHOLE, the inference seems to be conclusive that the state courts would have concurrent jurisdiction in all cases arising under the laws of the Union, where it was not expressly prohibited."

These views seem to have been shared by the first Congress in drawing up the judiciary act of September 24, 1789; for, in distributing jurisdiction among the various courts created by that act, there is a constant exercise of the authority to include or exclude the state courts therefrom; and where no direction is given on the subject, it was assumed, in our early judicial history, that the state courts retained their usual jurisdiction concurrently with the federal courts invested with jurisdiction in like cases.

Thus, by the judiciary act, exclusive cognizance was given to the Circuit and District Courts of the United States of all crimes and offences cognizable under the authority of the United States, and the same to the district courts, of all civil causes of admiralty and maritime jurisdiction; of all seizures on water under the laws of impost, navigation, or trade of the United States, and of all seizures on land for penalties and forfeitures incurred under said laws. Id. Concurrent jurisdiction with the state courts was given to the district and circuit courts of all causes where an alien sues for a tort only, in violation of the law of nations or a treaty of the United States: and of all writs at common law where the United States are plaintiffs; the same to the circuit courts, where the suit is between a citizen of the state where the suit is brought, and a citizen of another state, where an alien is a party, etc. Here, no distinction is made between those branches of jurisdiction in respect to which the constitution uses the expression "*all cases*" and those in respect to which the term "all" is omitted. Some have supposed that wherever the constitution declares that the judicial power shall extend to "all cases"—as, all cases in law and equity arising under the constitution, laws and treaties of the United States; all cases affecting ambassadors, etc., the jurisdiction of the federal courts is necessarily exclusive; but that where the power is simply extended "to controversies" of a certain class—as, "controversies to which the United States is a party," etc., the jurisdiction of the federal courts is not necessarily exclusive. But no such distinction seems to have been recognized by Congress, as already seen in the judiciary act. And subsequent acts show the same thing. Thus, the first patent law for securing to inventors their discoveries and inventions, which was passed in 1793, gave treble damages for an infringement, to be recovered in an action on the case, founded on the statute, in the Circuit Court of the United States, "or any other court having competent jurisdiction," meaning, of course, the state courts. The subsequent acts on the same subject were couched in such terms with regard to the jurisdiction of the Circuit Courts as to imply that it was exclusive of the state courts; and now it is expressly made so. See Patent Acts of 1800, 1819, 1836, 1870, and R. S. U. S. § 711; Parsons v. Barnard, 7 Johns. 144; Dudley v. Mayhew, 3 Comst. 14; Elmer v. Pennel, 40 Me. 434.

So with regard to naturalization, a subject necessarily within the exclusive regulation of Congress, the first act on the subject, passed in 1790, and all the subsequent acts give plenary jurisdiction to the state courts. The language of the act of 1790 is "any common-law court of record in any one of the states," etc. 1 Stat. 103. The act of 1802 designates "the supreme, superior, district or circuit court of some one of the states, or of the territorial districts of the United States, or a Circuit or District court of the United States." 2 Stat. 153.

So, by acts passed in 1806 and 1808, jurisdiction was given to the county courts along the northern frontier, of suits for fines, penalties and forfeitures under the revenue laws of the United States. 2 Stat. 354, 489. And by act of March 3, 1815, cognizance was given to state and county courts generally of suits for taxes, duties, fines, penalties, and forfeitures arising under the laws imposing direct taxes and internal duties. 3 Stat. 244.

These instances show the prevalent opinion which existed, that the state courts were competent to have jurisdiction in cases arising wholly under the laws of the United States; and whether they possessed it or not, in a particular case, was a matter of construction of the acts relating thereto. It is true that the state courts have, in certain instances, declined to exercise the jurisdiction conferred upon them; but this does not militate against the weight of the general argument. See, United Sates v. Lathrop, 17 Johns. 4. See especially, the able dissenting opinion of Mr. Justice Platt, Id. 11.

It was indeed intimated by Mr. Justice Story, *obiter dictum*, in delivering the opinion of the court in Martin v. Hunter's Lessee, 1 Wheat. 334–337, that the state courts could not take *direct* cognizance of cases arising under the constitution, laws and treaties of the United States, as no such jurisdiction existed before the constitution was adopted. This is true as to the jurisdiction depending on United States authority; but the same jurisdiction existed (at least to a certain extent), under the authority of the states. Inventors had grants of exclusive right to their inventions before the constitution was adopted, and the state courts had jurisdiction thereof. The change of authority creating the right, did not change the nature of the right itself. The assertion, therefore, that no such jurisdiction previously existed, must be taken with important limitations, and did not have much influence with the court when a proper case arose for its adjudication. Houston v. Moore, decided in 1820, 5 Wheat. 1, was such a case. Congress in 1795, had passed an act for organizing and calling forth the militia, which prescribed the punishment to be inflicted on delinquents, making them liable to pay a certain fine to be determined and adjudged by *a court martial*, without specifying what court martial. The legislature of Pennsylvania also passed a militia law providing for the organization, training and calling out the militia, and establishing courts martial for the trial of delinquents. The law in many respects exactly corresponded with that of the United States, and as far as it covered the same ground was for that reason held to be inoperative and void. Houston, a delinquent under the United States law, was tried by a state court martial; and it was decided that the court had jurisdiction of the offence, having been constituted, in fact, to enforce the laws of the United States which the state legislature had re-enated. But the decision, which was delivered by Mr. Justice Washington, was based upon the general principle that the state court had jurisdiction of the offence, irrespective of the authority, state or federal, which created it. Not that Congress could confer jurisdiction upon the state courts, but that these courts might exercise jurisdiction on cases authorized by the laws of the state, and not prohibited by the exclusive jurisdiction of the federal courts. Justices Story and Johnson dissented; and perhaps the court went further in that case, than it would now. The act of Congress having instituted courts martial, as well as provided a complete code for the organization and calling forth of the militia, the entire law of Pennsylvania on the same subject might well have been regarded as void. Be this as it may, it was only a question of construction; and the court conceded that Congress had the power to make the jurisdiction of its own courts exclusive.

In Cohens v. Virginia, 6 Wheat. 415, Chief Justice Marshall demonstrates the necessity of an appellate power in the federal judiciary, to revise the decisions of state courts in cases arising under the constitution and laws of the United States, in order that the constitutional grant of judicial power, extending it to all such cases, may have full effect. He says: "The propriety of intrusting the construction of the constitution and laws made in pursuance thereof, to the judiciary of the Union, has not, we believe, as yet been drawn in question. It seems to be a corollary from this political axiom, that the federal courts should either possess exclusive jurisdiction in such cases, or a power to revise

the judgment rendered in them by the state tribunals. If the federal and state courts have concurrent jurisdiction in all cases arising under the constitution, laws, and treaties of the United States, and if a case of this description, brought in a state court, can not be removed before judgment, nor revised after judgment, then the construction of the constitution, laws, and treaties of the United States, is not confided particularly to their judicial department, but is confided equally to that department and to the state courts, however they may be constituted."

See the subject further discussed in 1 Kent's Com. 395, etc.; Sergeant on Const. 268; 2 Story on Const. §§ 1748, etc.; 1 Curtis' Com. §§ 119, 134, etc.

The case of Teal v. Felton, was a suit brought in the state court of New York against a postmaster for negligence of duty to deliver a newspaper under the postal laws of the United States. The action was sustained by both the Supreme Court and Court of Appeals of New York, and their decision was affirmed by this court. 1 Comst. 537; 12 How. 292. We do not see why this case is not decisive of the very question under consideration.

Without discussing the subject further, it is sufficient to say, that we hold that the assignee in bankruptcy, under the bankrupt act of 1867, as it stood betore the revision, had authority to bring a suit in the state courts wherever those courts were invested with appropriate jurisdiction, suited to the nature of the case.

The judgment is affirmed.

Selections.

THE COUNTING OF THE ELECTORAL VOTES.—We publish the following extract from Paschal's Annotated Constitution, on account of the interest which now attaches to the above subject. Article XII. Amendment.

The electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least shall not be an inhabitant of the same state with themselves; they shall name in their ballot the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which list they shall sign and certify, and transmit sealed to the seat of government of the United States, directed to the president of the senate; the president of the senate shall, in the presence of the senate and house of representatives, open all the certificates and the votes shall then be counted; the person having the greatest number of votes for President shall be President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the house of representatives shall choose immediately, by ballot, the President. But in choosing the President the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the house of representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.

The person having the greatest number of votes as Vice-President shall be Vice-President, if such number be a majority of the whole number of electors appointed; that if no person have a majority, then from the two highest numbers on the list the senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of senators; and a majority of the whole number shall be necessary to a choice.

But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

"THE VOTES SHALL THEN BE COUNTED. THE PRESIDENT OF THE SENATE SHALL, IN THE PRESENCE OF THE SENATE AND HOUSE OF REPRESENTATIVES, OPEN ALL THE CERTIFICATES, AND THE VOTES SHALL THEN BE COUNTED."

The prevalent opinion in the earlier days of the government was that Congress were the mere witnesses of the count, but the present practice can be better illustrated by the precedent of 12th February, 1873. At the hour of one o'clock, after due notice that the house was ready, the senate proceeded in a body to the house. Then Mr. Sherman acted as teller for the senate, and Mr. Dawes, Mr. Beck and others as tellers for the house, the Vice President presiding and the speaker of the house seated at his left hand. The counting and recording of the votes proceeded regularly until the certificate of the vote of the electors of Georgia had been read by the tellers, when Mr. Hoar put in the following written objection:

"Mr. Hoar objects that the votes reported by the tellers as having been cast by the electors of the state of Georgia for Horace Greeley, of New York, can not lawfully be counted, because said Horace Greeley, for whom they appear to have been cast, was dead at the time said electors assembled to cast their votes, and was not 'a person' within the meaning of the constitution, this being an historic fact of which the two houses may properly take notice."

Some objections also having been stated to the vote of Mississippi, the senate, under the 22d joint rule, withdrew.

In the senate the part of the joint rule bearing upon the determination of the question was read as follows:

"If, upon the reading of any such certificate by the tellers, any question shall arise in regard to counting the votes therein certified, the same having been stated by the presiding officer, the senate shall thereupon withdraw, and said question shall be submitted to that body for its decision; and the speaker of the house of representatives shall, in like manner, submit said question to the house of representatives for its decision; and no question shall be decided affirmatively, and no vote objected to shall be counted, except by the concurrent votes of the two houses, which being obtained, the two houses shall immediately reassemble, and the presiding officer shall then announce the decision of the question submitted, and upon any such question there shall be no debate in either house; and any other question pertinent to the object for which the two houses are assembled may be submitted and determined in like manner."

After some amendments offered by Mr. Conkling, giving the reasons for action, and striking out the word "not," on motion of Mr. Sherman, a resolution of Mr. Edmonds was passed in these words:

"*Resolved*. That the electoral vote of Georgia cast for Horace Greeley be counted."

The house retained the word "not" in its resolution; so the two houses disagreed as to whether electoral votes cast for a candidate who died after a popular election, or, more properly, perhaps, they disagreed as to whether the houses had the power to determine the question. But the result of the disagreement under the rule was that the three votes cast for Mr. Greeley were not counted. The Vice President stated that, by a precedent four years ago, it was not necessary that the resolution should be concurrent, but the decisions must accord.

"Mr. Trumbull objects to counting the votes cast for President and Vice President by the electors in the state of Mississippi, for the reason that it does not appear from the certificate of said electors that they voted by ballot."

This objection was not urged by Mr. Trumbull, and the votes of Mississippi were counted.

The vote of Arkansas was not counted, because the certificate was not under the seal of the state, but the seal of the secretary of state. The two houses failing to concur, the vote of this state was not counted. From Louisiana there were two sets of returns; one signed by the governor, and regular upon its face, the other by a returning board. But there had been a report from a committee of the senate, showing that the Grant board certified without returns, and the other without a legal count. Both houses resolved against counting Louisiana. So it resulted that three votes of Georgia were not counted, and all the votes of Arkansas and Louisiana were not counted.

The precedents are—1. That under the joint rule the two houses may judge as to the existence of the person voted for, which goes to the qualifications. 2. They may reject votes for irregularity of the proceedings and certificates from the states.

The result was that of the 366 electoral votes, Grant and Wilson got 286, and all others 63. The Vice President declared Grant and Wilson elected President and Vice President.

[NOTE.—It is contended that the joint rules of the two houses are no longer in force.—ED.]

LIMITATIONS IMPOSED BY THE CONSTITUTION OF THE UNITED STATES ON THE TAXING POWERS OF THE STATES.*—1. *Impairing the Obligation of Contracts.*—The provision prohibiting the states from passing "any law impairing the obligation of contracts," is found in the same paragraph with the prohibition against passing any bills of attainder, *ex post facto* laws, and laws granting titles of nobility. Const. U. S. Art. 1, § 10, par. 1. The questions affecting the taxing power of the states, arising under this provision, relate almost exclusively to the charters of corporations which contain clauses exempting them from taxation, and the effect of subsequent laws repealing these clauses and imposing taxes upon them. Whether the charter of a private corporation, or of a corporation not municipal, is a contract within the meaning of the constitution, was first settled by the Supreme Court of the United States in the celebrated Dartmouth College case. Trustees of Dartmouth College v. Woodwrad, 4 Wheat. 519 (Cond. U. S. 463, February, 1819). The court had previously decided that a grant of land by the legislature of a state was a contract; that the acts of a subsequent legislature could not divest rights acquired under the grant, and a repeal by such legislature was void. Fletcher v. Peck, 6 Cranch, 164 (Cond. U. S. 328, February, 1810). And shortly after they applied the principle to a case of exemption from taxation. The legislature of New Jersey, in order to acquire title to an extensive tract of land held by the Indians, in consideration of a release of that title, agreed to purchase for them certain lands, which should not thereafter be subject to any tax. Subsequently, these lands so purchased for the Indians, were sold by them under a law passed for that purpose. The legislature then repealed that section of the act exempting the lands from taxation. The court held the first act was a contract between the Indians and the state, and that the vendees of the Indians could not be divested of the right granted to the Indians, to be exempt as to this land from taxation without impairing the obligation of the contract. New Jersey v. Wilson, 7 Cranch, 164 (Cond. U. S. 498, February, 1812). The doctrine of the Dartmouth College case has been followed from that time, not only in the courts of the United States, but in all the state courts. Recently, the correctness of that decision has been seriously questioned, and it would seem to be clear from the history of the adoption of this provision of the constitution, that it was only intended to apply to contracts between private individuals, to give the same protection to civil contracts against retrospective legisla-

* From a forthcoming treatise on "Taxation," by Hon. W. H. Burrough, of Norfolk, Va. See *ante* pp. 453, 469.

tion as is given in the same paragraph to retrospective legislation as to crimes; that the provision against *ex post facto* laws, and laws impairing the obligation of contracts, each refer to individual citizens of the states, and not to the states. This decision has been so long and universally acquiesced in, that it comes within the principle of *stare decisis*, and will no doubt be adhered to even by those courts that are convinced that it is erroneous.

(*a*) *Alienation of the Taxing Power.*—The application of the principle of the Dartmouth College case in connection with the taxing power of the state, while it has received the assent of the majority of the judges in the Supreme Court of the United States, has been resisted most vigorously by the dissenting judges, and in many of the state courts it has been entirely repudiated. These cases hold that a charter of incorporation is a contract between the state and the incorporators, and if these charters contain a clause, either exempting them entirely from taxation or for a definite period, a subsequent legislature can not repeal those clauses of exemption; an attempt to do so impairs the obligation of the contract contained in the charter, and is void; that a state legislature may make a contract with corporations as to the revenue of the state, and that such a contract is equally within the protection of the federal constitution, as contracts with reference to property. State Bank of Ohio v. Knoop, 16 How. 369 (Cond. U. S. 190); Home of the Friendless v. Rowse, 8 Wall. 430; Washington University v. Rowse, Id. 439; Washington Railroad v. Reid, 13 Id. 264; Humphrey v. Peques, 16 Id. 244; Jefferson Branch Bank v. Skelly, 1 Black. 436, involving the construction of the same statute of Ohio as in 16 How. *supra;* McGee v. Mathias, 4 Wall. 143. Many of the state courts have followed these decisions; others have steadily opposed them. The interests involved in this question are so great, the power of wealthy corporations who claim the benefit of this principle is so extensive, and the tendency of eminent legal critics to question the soundness of the views of the majority of the Supreme Court of the United States so plain (8 American Law Review, 189; Sedgwick's Const. & Stat. Law, 2d ed. 587, *n.*), that it is appropriate to give, in some detail, the views of the dissenting judges and the dissenting state courts.

(*b*) *Dissenting Views.*—Those who dissent generally admit the doctrine that a state is bound by its contracts, and a legislature of a state, as to all matters within the purview of legislative power, may make contracts which are protected by this provision of the federal constitution. But it is claimed that the power of taxation is one of the sovereign powers of the state, necessary to its continued existence, and that it was never contemplated, when the people through their constitutions delegated to their representatives in the legislature assembled the power to make laws for the good of the people of the state, that this grant of legislative power carried with it the right to barter away with private corporations one of the essential prerogatives of the government, the very life-blood of the state. State Bank of Ohio v. Knoop, 16 How. 406 (Cond. U. S. 219), the able dissenting opinion of Campbell, J. This case was really the first authoritative decision on this subject; the case of New Jersey v. Wilson, did not discuss the important principle that taxation was one of the powers of sovereignty that could not be alienated. 7 Cranch, 164 (Cond. U. S. 408). The case from Ohio was decided at the December term, 1853; of the nine judges on the bench, three, Catron, Daniel and Campbell, dissented, and Taney, C. J., while concurring in the judgment rendered, did not assent to the principles or reasoning contained in the opinion of the court as delivered by McLean, J. 16 How. 398 (Cond. U. S. 207). At the same term of the court a case was decided from the same state, in which the court held that the legislation of the state did not amount to a contract, and in that case Judge Taney gave his views upon the principle under discussion thus: "The powers of sovereignty confided to the legislative body of a state, are undoubtedly a trust committed to them to be executed to the best of their judgment for the public good; and no one legislature can, by its own act, disarm its successors of any of the powers or rights of sovereignty confided by the people to the legislative body, *unless they are authorized to do so by the constitution under which they are elected.* They can not, therefore, by contract deprive a future legislature of the power of imposing any tax it may deem necessary for the public service, or of exercising any other act of sovereignty confided to the legislative body, unless the power to make such a contract is *conferred upon them by the constitution of the state.* And in every controversy on this subject, the question must depend on the constitution of the state, and the extent of power thereby conferred on the legislative body." He then examines the constitution of Ohio, and arrives at the conclusion that under the constitution of 1802, and the decisions of the courts of that state, such power was given to the legislature of Ohio. Ohio Life Insurance and Trust Co. v. Debolt, 16 How. 431 (Cond. U. S. 234). In the first case Judge Taney refers to his opinion in the latter case for the reasons of his concurrence in the opinion in the majority of the court. Judge Grier concurred entirely in these views of Judge Taney. From this examination of the views of Judge Taney, it is evident that he did not yield his assent to the proposition that a general grant of legislative power, authorized one legislature to alien the power of taxation so as to bind a subsequent legislature. He only claimed that the people, in their sovereign capacity, speaking through their organic law, could delegate to the legislature such power. The subject was before the court in 1861, the case involving the construction of the same statute of Ohio just considered, and the ruling was the same. At the December term, 1869, it was again under consideration, the majority adhering to the ruling in 16 Howard, Judges Miller and Field and C. J. Chase dissenting. Miller, J., says: "We do not believe that any legislative body, sitting under a state constitution of the usual character, has a right to sell, to give, or to bargain away forever the taxing power of the state. This is a power which, in modern political societies, is absolutely necessary to the continued existence of every such society. While under such forms of government, the ancient chiefs or heads of the government might carry it on by revenues owned by them personally, and by the exaction of personal service from their subjects; no civilized government has ever existed that did not depend upon taxation in some form for the continuance of that existence. To hold, then, that any one of the annual legislatures can, by contract, deprive the state forever of the power of taxation, is to hold that they can destroy the government they are appointed to serve, and that their action in that regard is strictly lawful. The result of such a principle, under the growing tendency to special and partial legislation, would be to exempt the rich from taxation, and cast all the burden of the support of government, and the payment of its debts, on those who are too poor or too honest to purchase such immunity." Washington University v. Rowse, 8 Wall. 443-4. At the December term, 1871, the subject was again before the court, and the question was treated as *res adjudicata:* Wilmington Railroad v. Reid, 13 Wall. 264. And so again at the December term, 1872, it was treated in the same manner. Humphreys v. Peques, 16 Wall. 244. This examination shows that the principle claimed to be decided, and which has governed the later cases, has never received the assent of this tribunal. In New Jersey v. Wilson, it was not even discussed; In State Bank of Ohio v. Knoop, three of the nine judges dissented entirely from the opinion of the court, and two others, Taney and Grier (a host within themselves), dissented from the reasoning of the court, and based their opinions of concurrence in the result of the opinion, upon a different principle, and fully agreed with the dissenting judges as to the principle that a general grant of legislative power did not authorize one legislature to alien the taxing power so as to bind subsequent legislatures. In their opinion such a power might be granted by the constitution of the state and was granted by the constitution of Ohio.

(*c*) *Dissenting Views of State Courts.*—A number of cases were decided at the January term, 1853, of the Supreme Court of Ohio, arising upon the 60th section of the banking act of 1852, in which the view is taken and argued with great force, that a charter of incorporation is not a contract. The view of Burke as to the charter of the East India Company, that it was a "charter to establish monopoly and create power," and not entitled to the protection of the various charters of English liberty, is approved; and the charters of incorporation granted by the state were thought, in a similar manner, not to be entitled to the protection of the provision of the constitution prohibiting the impairing the obligation of contracts. Knoop v. The Piqua Bank, 1 Ohio, N. S. 603; Toledo Bank v. Bond, Id. 622; Debolt v. Ohio Life Ins. & Trust Co. Id. 563. These cases were reversed by the Supreme Court of the United States in 16 How. The question was before the Supreme Court of Ohio in Sandusky Bank v. Wilbor, 7 Ohio, N. S. 481, when they adhered to their former opinion, claiming that, although precedent was against them, the cases did not convince their judgment and ought not to be followed. The courts of Maryland, Michigan, New Jersey, New Hampshire, Vermont, Pennsylvania, Connecticut and North Carolina have taken similar views to the courts of Ohio. Mayor of Baltimore v. Balt. & Ohio Railroad Co., 8 Gill, 289; East Saginaw Manf. Co. v. City of East Saginaw, 19 Mich. 259; State *ex rel.* &c. v. Mayor of Jersey City, 31 N. J. L. (2 Vroom) 575; Brewster v. Hough, 10 N. H. 143; Thorpe v. R. & B. Railroad Co., 27 Vt. 140; Mott v. Penn. Railroad Co., 30 Penn. St. 9; Brainard v. Colchester, 31 Conn. 410; Raleigh Railroad Co. v. Reid, 64 N. C. 155. Beasley, C. J., in commenting on the proposition that a charter of incorporation is a contract, says "the entire contract on the part of the state, implied in such cases, is the supposed legislative agreement not to alter or recall the privilege granted. No other stipulation on the part of the state was ever suggested to exist, and it was the imagined existence of such stipulation alone which converted what else, in all its essential qualities, as well as in its form, was an act of legislation, into a contract on the part of the community with the corporators. Without some such stipulation, having an obligatory force, I am wholly unable to conceive the ground of difference between the charter of a corporation and any other act of legislation. If a statute lay no obligation on the state to do, or to refrain from doing, a particular thing, or one or more particular things, such enactment seems to me to be a pure act of legislation, and in no sense a contract." 31 N. J. L. (2 Vroom) 580, and Cooley, J., in reviewing the cases in the Supreme Court of the United States, from New Jersey v. Wilson, 7 Cranch, to McGee v. Mathias, 4 Hall, says: "It is not very clear that the Supreme Court of the United States has ever, at any time, expressly declared the right of a state to grant away the sovereign power of taxation." 19 Mich. 282 P.P.; Iron City Bank v. Pittsburg, 37 Penn. St. 304. The court in Pennsylvania say: "Revenue is as essential to government as food to individuals; to sell it is to commit suicide." 30 Penn. St. 9.—[*American Law Register.*

Book Notices.

GREENLEAF ON EVIDENCE, 13TH EDITION.—A Treatise on the Law of Evidence by SIMON GREENLEAF, LL. D. Volume 1, 13th Edition. By JOHN WILDER MAY, Author of the "Law of Insurance," Etc. Boston: Little, Brown & Co. 1876.

This volume, while preserving substantially the same size as volume one of the previous edition, presents the results of nine hundred cases which were not incorporated into that edition. This has been done by eliminating from the text of the last edition matter which had been inserted by various editors, leaving it as it was left by Dr. Greenleaf, and

obliging his various editors to take back seats in the notes, where modesty should have placed them in the first instance. There is not much to be said about a work which is in every law library in the country,—which is, in fact, the only distinctively American work on the law of evidence which we have,—except to commend the industry and discrimination of the present editor. The value of his labors is greatly enhanced by an improved index, which contains numerous cross-references. We hope to be able to notice the present volume of Greenleaf more at length when the remaining two volumes come to hand.

LEADING CASES DONE INTO ENGLISH.—By an Apprentice of Lincoln's Inn. Second Edition. London: Macmillan & Co. 1876. St. Louis: Gray, Baker & Co.

Although "legal recreations" so-called, are decidedly modern, it could hardly be supposed that the iconoclasts would be long either idle or backward, when even the shade of great Blackstone could not save his work from the hammer of Mr. A'Beckett. The "humorous phases of the law," are appreciated by none so much as by lawyers themselves, and when an essay of this kind is authentic as well as clever, with a pound of amusement we obtain several ounces of instruction. Verse is more easily remembered than prose, and Dr. Arnold employed it with success in teaching the Latin verbs. A law treatise in rhyme would probable pay the poet more than poets are generally paid, but this is not what the *brochure* before us is. The work of the apprentice consists of sixteen leading English cases rendered in a quaint sort of verse. Here Elwes v. Mawe, is not the lengthy judgment of the king's bench, but "the strife immortal that rose betwixt landlord and tenant, strife that set high in the Heavens, a star to illumine in all time, divers kinds and distinctions of chattels annexed to the freehold." The law of fixtures is much less perplexing when presented in hexameters than in folios. The rules laid down in Armory v. Delamarie, are that "the finder hath lawful possession for all men save the very owner's title," and "for what man hideth truth in wrongdoing against him the law deemeth everything." We have not space to multiply examples, but would recommend the book to any professional friend of ours in whom "the lawless science of our law, that codeless myriad of instances," has not yet extinguished a literary taste.

The work is dedicated to J. S. For the benefit of the public the author has in a note explained who this party is, and although we have long been acquainted with the gentleman, the explanation is so good that we can not refrain from quoting it: "This J. S. is a mythical person introduced for the purpose of illustration, and constantly met with in the older books of our law, especially Sheppard's Touchstone; a kind of cousin to John Doe and Richard Roe, but more active and versatile. In later works, and in the Indian codes, his initials, which are supposed to stand for John Stiles, have degenerated into unmeaning, solitary letters, such as A, B and C. The old books are full of grants of lands to him for various estates, so that his wealth is evident. He also appears as a trustee and arbitrator, and (incongrously) as a servant. His devotion to Rome is shown by his desperate attempts to get there in three days. "If J. S. shall go to Rome in three days," is a standing example of an impossible condition. "If," or "until J. S. shall return from Rome," is also a frequent example of a condition or conditional limitation; hence the importance of that event is obviously not exaggerated by the poet. It is not clear why he did not want to ride to Dover, seeing it was on his way to Rome. It is said, however, that one who is bound in a bond with condition that he shall ride with J. S. to Dover on such a day, must procure J. S. to go thither, and ride with him at his peril. Aulus Agerius and Numerius Negidius are corresponding, and therefore rival, personages of the civil law, who may be found in the Digests and Institutes."

OUTLINES OF THE POLITICAL HISTORY OF MICHIGAN. By JAMES V. CAMPBELL. Detroit: Schober & Co. 1876.

The high reputation of the author as one of the judges of the Supreme Court of Michigan warrants the assumption that, in the compilation of his work, he would be comprehensive and thorough in his investigations, clear in his statement of facts, and impartial in his criticism. But Judge Campbell has done more than this; he has written a book which possesses many literary merits outside of its historical value, and which will be read with deep interest. In his modest preface he informs us that the work "was originally intended as a sketch to be used for the purposes of the centennial committee of Michigan, and was prepared in more haste than was otherwise desirable." For his materials he has "drawn freely from the Lanmans and Mrs. Sheldon, from the 'Historical Sketches of Michigan,' and from the local sketches of Judge Witherell and Mr. R. E. Roberts, as well as from Parkman and the French authors, especially Charlevoix, La Honton, Hennepin, Tonty and Joutel—correcting them as far as he could by the French documents,"—as also Mr. Lossing's "Field-book. He has availed himself of much which has not been recorded by the historians, but which has "been found scattered through early and modern biographies, books of travel, and other less pretentious works, as well as in newspapers and private writings; and many interesting facts appearing incidentally in public documents, land books and other local records." Lastly, the author's long residence in the chief city of the state "has given some opportunities for procuring information from living sources, and for observing things which were not without value for reference. It has also enabled the writer to understand and explain some things which could hardly be comprehended from writings alone."

Two-thirds of the book is necessarily devoted to the period anterior to the admission of the territory as a state. The early history of Michigan is interwoven with the history of Canada; during the war of 1812 the territory played an important part. The struggles of the old French discoverers, the Indian wars, and the establishment of the Anglo-Saxon race, combine to make an entertaining story. As the writer says, "the French system was not designed or calculated to build up self-governing communities, and theoretically, and, in many cases, practically, there was absolutism." Even when Michigan was peopled by free and intelligent Americans, it took many years before the "reign of law" was inaugurated, other than those principles of civil justice designated as "right between man and man." The state had many difficulties in its early days. Besides having to bring stubborn nature to a reasonable degree of submission, the settlers were in continual hot-water with the British and the Indians; then there was an epidemic; and, what was even worse, a company of Mormons located within the territory, and strongly objected to being "ousted." The "rag baby" was king in the days of Governor Cass. The currency generally used was Ohio paper (the credit of which was very low) and private bills or "shinplasters," which very soon became much more abundant than the prosperity of the country required. In the remote regions, business was carried on upon the "dicker" or barter system, and articles easily handled were often accepted as legal tender. It is related that in one community nests of wooden bowls became current for small change.

Coming down as far as 1806, it is a singular fact that no provision had been made for publishing the Territorial Laws, and some of them were lost and never recovered. In 1816 a small, badly-printed volume was published in Detroit, containing the titles of some laws, and abstracts or indexes of others, and a very few in full. In 1820, Congress appropriated $1,250 for the publication of existing laws. Until the year 1831, the public whipping-post was a standing institution, at which Indians, negroes, disorderly persons and those convicted of small offences, were lacerated. At that date, also, the poor were sold to the highest bidder, and the ball-and-chain gang were in use. Duelling, challenging and posting were made punishable in 1815 for the first time. The law was borrowed from New Jersey which had once been a great duelling ground. The judicial system in Mackinaw and the counties west of Lake Michigan worked very badly. In the supreme court a trial was had by a jury as in the lower courts. Congress, in March, 1823, completely revolutionized the territorial government. The legislative power was transferred to the governor and council, composed of nine persons selected by the President and confirmed by the senate, out of eighteen elected by the people of the territory. Sessions were not to exceed sixty days, and laws were subject to congressional abrogation. The judges were to have equity as well as common law powers, and their term of office was reduced to four years, instead of during good behavior—a step backward, in our opinion; as the author says, the object, no doubt, was to get rid of some of the judges.

On the 26th of January, 1837, after much debate and delay, Michigan was admitted into the Union. The supreme court was organized by the appointment of William A. Fletcher as chief justice, and George Morell and Epaphroditus Ransom, associates. Elon Farnsworth was the first chancellor. The court of chancery was subsequently — by the revised statutes of 1846 — abolished, and the jurisdiction vested in the circuit courts. The chief justice had been appointed in 1836 to prepare a revised code of laws. His success in this undertaking was not great, and in 1839, a year after it took effect, a number of amendments had to be adopted to supply its deficiencies. In 1844, a law was passed securing to married women their real and personal property, free from the control of their husbands; this has been re-enacted in the present constitution. In 1846, a great change was made in the judicial system. "For three or four years," the author says, "a majority of the legal business of the state was required to be brought in county courts, with elected judges, paid at first by fees, and afterwards by a discretionary salary from the county treasury. These courts were introduced on an idea that they would render justice speedily, cheaply and satisfactorily. In some counties able men presided in them and gave satisfaction. This, however, was not so general as to be customary, and the method of doing business deprived parties of some of the most important legal safeguards to the impartial selection of juries. Neither delays nor expenses were lessened, but, in the end, increased, as every needless intermediate tribunal has always been found to operate. They did not, in many counties, command respect, and became disorderly. When the constitution of 1850 was adopted they were, by universal consent, discontinued as worse than failures."

The revision of 1846, which abolished the court of chancery also reformed the law of evidence, by abrogating the common law rule rendering a witness incompetent by reason of interest or character. In criminal law, the greatest change was the abolition of capital punishment, and fixing the punishment of murder in the first degree at imprisonment for life, with no discretion to reduce it. The remarks of so distinguished a jurist as Judge Campbell on the results of this alteration in the law, will bear repeating here. "The statistics of crime," he says "have never been so thoroughly intelligible that any one can determine very safely what effect this change has had. It is very doubtful how far the degree of punishment has any direct bearing on the minds of those who commit the crime of murder. There is, no doubt, an indirect influence exercised on public opinion by all penal statutes, which reaches criminals and innocent persons alike, and produces some effect on their estimate of conduct. But very few have been known to calculate on the measure of punishment before committing criminal or other violent assaults. There has been no popular or general expression which would indicate a desire to restore the death penalty, and it is questionable whether, if existing, it would be disturbed if left to a popular vote. The change made in 1846 was not either demanded or

condemned by the general sentiment. Murders had not been common in the state, and then, as now, whatever opinions there were upon the subject were not the result of study or experience, but rather of pre-existing ideas and differing theories. . . . A change so radical as the removal of the gallows from among the instruments of punishment, could not fail to create much comment, but it did not elicit any full expression of popular feeling."

In 1838 the supreme court was reduced to four judges, and in 1848 to five; a year later a constitutional amendment was proposed, and afterwards carried, making them elective. The constitution of 1850 created eight circuit judges with supreme court powers, instead, as formerly, supreme court judges with circuit court powers. They were to hold office for six years, and have both law and equity jurisdiction. County courts were abolished, and the jurisdiction of justices of the peace increased. At the expiration of six years, a separate supreme court, consisting of four judges, was to be created. Accordingly, in 1857, this was done. George Martin was the first chief justice under the amendment, which position he filled until the day of his death, in 1867. Randolph Manning, Isaac P. Christiancy, and the author of this work, who still remains a member of this court, were the first associates. Judge Manning died in 1864, and was succeeded by Judge Cooley, whose reputation as a jurist is world wide. Benjamin F. Graves succeeded Judge Martin, and is still on the bench. In 1875, Judge Christiancy was elected to the United States Senate, and Isaac Marston was selected to fill his place. Michigan may well point with pride to her supreme court. What we regard as the evils of the elective system when applied to the judiciary, has not prevailed in this state, at least.

Time and space prevent us from referring further to the contents of this work. We are unable to give even an epitome of the information which Judge Campbell has collected on other matters, of the history of the educational measures, internal improvements, banking laws, manufactures, appropriations for public works, free schools, railroads, surveys, prohibitory laws, charitable institutions, and the growth and annals of political parties, which are here sketched. In the compilation of his work, Judge Campbell has rendered a service to the people of to-day in placing before them an impartial and authentic record of the growth of this great state; of their successes and reverses and errors, upon which we may study with profit; and to the historian of the future, in helping to preserve material which otherwise might be misapprehended or lost.

Recent Decisions in Illinois.*

Taxes — Failure to Make Return as Required by Law — Formal Objections.—*Purrington et al. v. People*, p. 1. Opinion by Scott, C. J. 1. Although, under the statute, it is the duty of the town assessor to make return of the assessment books to the county clerk on, or before the first day of July of the year for which the assessments are made, yet a failure to make the return within the time limited, does not render the assessment invalid. 2. This court is not inclined to entertain merely formal objections to taxes levied by municipalities, where the irregularities complained of do not affect unjustly the rights of the citizen.

Alimony—How Regulated—When Allowed.—*Deenis v. Deenis*, p. 74. Opinion by Scholfield, J. 1. Alimony may be allowed under the statute, notwithstanding the divorce is granted for the fault of the wife. 2. It is not the law that alimony must be given to the wife in all cases, but only in those cases where, from all the circumstances, it is equitable to do so. 3. In cases where the circumstances may justify a divorce under our statute, there may be a widely different degree of merit on the one side, and censure on the other, which should very properly be considered in determining the question of alimony, quite independent of the pecuniary circumstances of the parties.

Ordinance Requiring Dealers in Second-hand Goods to be Licensed — Booksellers Buying and Selling Second-hand Books.—*Eastman et al. v. City of Chicago*, p. 179. Opinion by Scott, C. J. An ordinance of a city which required dealers in second-hand goods to procure a license, declared that, "any person who keeps a store, office or place of business, for the purchase or sale of second-hand clothing, or garments of any kind, or second-hand goods, wares, or merchandise, is hereby declared to be a dealer in second-hand goods." *Held*, that booksellers, dealing in such stock, as is usually kept in a retail book store, who buy and sell in connection with their other business, and as incidental thereto, second-hand books, are not "dealers in second-hand goods," within the meaning of the ordinance.

Guarantors—Liability on a Joint Guaranty.—*Gage v. Merchant's National Bank of Chicago*, p. 62. Opinion by Breese, J. 1. Where the payees of a promissory note endorse on the back of it, "For value received, we guarantee the payment of the within note at maturity," they become jointly and severally liable to pay the note at maturity. 2. In such case the holder, as between the maker and the guarantors, is under no obligation to demand payment of the maker, and, on his default, to notify the guarantors; but it is the duty of the guarantors, and of each of them, on maturity of the note, to go to the holder and take it up. 3. Joint guarantors of a promissory note do not stand in the relation of principal and surety, but each one is a principal, and neither one is discharged by the negligence of the holder of the note in not compelling payment by the other of his equitable share. 4. Where two persons jointly gauranty the payment of a promissory note payable to themselves, and deliver it to another for a valuable consideration, they may be sued jointly or severally, and it is no defence to the action against one, to show that at the time the note became due the other was able to pay his proportion of it, and that the holder, by suit, could have collected it from him, and that before the suit was brought he had become insolvent.

Presumption—Party Signing Promissory Note—Guarantor.—*Boynton v. Pierce et al.*, p. 145. Opinion by Scott, C. J. 1. Where the name of a party not the payee is found written on the back of a note, it will be presumed, in the absence of explanatory evidence, that he placed it there at the time of making the note, and that he endorsed it as a guarantor. 2. Such an endorsement in blank, is authority to the holder of the note to write over the signature anything that is consistent with the undertaking, and, as the undertaking is primarily that of a guarantor, it is proper for the holder to write a guaranty over the name on the back of the note. 3. In a suit on such a guaranty, where the defendant pleads the general issue, verified by affidavit, all that the plaintiff is required to prove, is the signature of the defendant. 4. The rule would be different if the holder of a note, endorsed in blank by the payee, should write a guaranty over the signature, and bring suit on it as a guaranty. In such case, if the defendant should deny the guaranty, under oath, the burden of proof would be upon the plaintiff to show that a contract of guaranty was intended. 5. The presumption that a party not the payee, who places his name on the back of a note, is a guarantor, may be rebutted by parol evidence. The character of the liability assumed may be explained, and the legal presumption rebutted. Citing, Camden v. McKoy, 3 Scam, 437; Hance v. Miller, 21 Ill. 636; Dietrich v. Mitchell, 43 Ill. 40; White v. Weaver, 41 Ill. 409.

Custom of Trade—Goods Damaged Delivered Under an Executory Contract may be Returned within a Reasonable Time.—*Doane et al. v. Dunham*, p. 131. Opinion by Walker, J. 1. Customs and usages of trade are supposed to enter into, and form a part of, all contracts where the usage of custom prevails, in reference to the matter to which the contract relates. 2. Where a party purchases of a wholesale dealer goods of a particular quality, to be delivered at a future time, it is the duty of the purchaser to examine the goods, and if not of the quality purchased, to notify the seller to take them back, within a reasonable time considering all the circumstances of the transaction. 3. If the goods are purchased in original packages of a wholesale merchant by a dealer, and it is the usage and custom not to examine such goods until opened by dealers to sell to customers, and both parties deal with reference to such usage and custom, then an examination made by the dealer when he opens the package to sell to customers, will be within a reasonable time, provided the goods are offered for sale in due course of trade. 4. Where goods are delivered to a purchaser under an executory contract of sale, and they are not of the quality bought, and the buyer notifies the seller to take the goods back, it is a question of fact, to be determined by the jury in the light of all the attending circumstances, whether such notice was given in apt time or not.

Trust Deed—Disposition of Surplus of Proceeds of Sale—Lien under Attachment from Foreign County.—*Hall v. Gould et al.*, p. 16. Opinion by Walker, J. 1. The maker of a trust deed to secure an indebtness may provide for any disposition of the surplus of the proceeds of a sale under it, after paying the debt, that he chooses, so that creditors are not defrauded. 2. Where a deed of trust authorizes the trustee to sell the land and pay costs, commissions, liens on the land, etc., as well as the particular debt secured, he is authorized to pay out of the proceeds of the sale any judgment which may be a lien on the land at the time of the sale, whether it existed at the time the deed was executed or not, and the owner of such judgment can subject any surplus in the hands of the trustee to its payment, after the particular debt secured by the deed of trust is paid. 3. Where a deed of trust is given upon several tracts of land, to secure a specified indebtedness, and the trustee is authorized to sell the land and pay the particular debt, and also all costs, commissions and liens on the land, and the holder of the particular indebtedness purchases a judgment rendered against the maker after the execution of the deed of trust, which is a lien upon the land, the authority of the trustee is not exhausted when he has sold enough of the land to pay the particular debt, but he may sell enough to pay the judgment also, provided the judgment is a *bona fide* debt. 4. A levy on real estate of an attachment from another county, does not become a lien until a certificate of the levy is duly filed in the office of the recorder of the county in which the land is situated. 5. Where an attachment from another county was levied on land the day before it was sold under a deed of trust, but the certificate of levy was not filed until after the sale, the attachment did not become a lien on the land, notwithstanding notice thereof was given at the sale.

Slander — Proof of Publication — Construction of Meaning of Words Spoken—Damages.—*Miller v. Johnson*, p. 59. Opinion by Scott, J. 1. Evidence that slanderous words were uttered in the presence of members of the plaintiff's family is proof of the publication of the slander. As much protection is due a man's reputation in the presence of his family as in the presence of strangers, and when slanderous words are uttered of a person in the presence of others, whether members of his family or strangers, they may be said to be spoken concerning him, in the technical sense, and that constitutes a publication of the slander. 2. Where a defendant has uttered slanderous words concerning a plaintiff, which, in their ordinary and common signification, impute crime, it must be presumed it was in that sense they were understood by the by-standers who heard them, and the defendant

* From the advance sheets of 79 Illinois Reports.

can not, when sued, excuse his guilty conduct by an explanation in his testimony that he did not use the words in the sense to impute to the plaintiff the crime thereby indicated. 3. If a person who utters slanderous words imputing crime, limits them, when uttered, so as to show he does not intend to charge the person spoken of with having been guilty of crime, it is admissible, in an action for the words spoken, for him to give in evidence such qualification. In an action for slander, the anger or passion of defendant at the time of the publication of the slanderous words is no justification, or even mitigation, unless it is shown the passion was provoked by plaintiff, and even then it can only be proved in mitigation of damages. 5. Where a plaintiff, who had always borne an irreproachable character, was accused by the defendant with the crime of larceny, and there was nothing which justified or palliated the conduct of the defendant, a verdict for $1000 was not regarded excessive.

Notes of Recent Decisions.

Judicial Notice—Notary Public.—*Denmead v. Mack et al.* Supreme Court, District of Columbia, 3 Wash. L. R. 276. Opinion by McArthur, J. This court can take notice of the authority of a notary public in the state of Maryland to administer an oath to an affidavit, to be used in an action pending in this jurisdiction; the same being certified by his signature and notarial seal, without any other verification that he was qualified to act as such notary.

Mortgage Given to National Bank—Ultra Vires—Rights of Endorser of Notes Secured by Mortgage.—*Woods v. People's Nat. Bk. of Pittsburg.* Supreme Court of Penn., 7 Pitts. Leg. Jour. 58. Opinion by Paxson, J. 1. A mortgage given to a national bank to secure a pre-existing debt by the mortgagor, and to secure a future loan to him, is, as to the later, *ultra vires*. 2. If the mortgaged premises be sold, the proceeds arising therefrom must be applied in discharge of such pre-existing debt, notwithstanding such proceeds arose from a sale by the sheriff. 3. An endorser of notes held by a national bank, secured by a mortgage, has a right to have the proceeds arising from a judicial sale of the mortgaged premises by the bank, applied to the payment of such notes in his relief. Fowler v. Scully, 22 P. F. Smith, followed.

Practice in United States Courts—No Power to Enter Non-suit without Consent—Master and Servant—Injury to Servant—Common Employment.—*Miller v. Baltimore & Ohio R. R.* United States Circuit Court, Southern District of Ohio. 1 Cin. Law Bul. 276. Opinion by Swing, J. 1. The Circuit Court of the United States have no power to grant a peremptory non-suit against the will of the plaintiff. "Under the law of Ohio, the court in a proper case, might either grant a non-suit or arrest the testimony from the jury, and direct a verdict for defendant, and if we are to be governed by the law of Ohio, we should proceed to the examination of the merits of the motion. It is claimed that section five of the act of Congress passed June 1, 1872, which provides 'that the practice, pleadings, forms and modes of proceding, in other than equity and admiralty causes in the circuit and district courts, shall conform as near as may be, to the practice, pleadings and forms, and modes of proceeding existing at the time in like causes in the courts of record in the state within which such circuit or district courts are held,' would require us in the disposition of this motion to conform to the state practice. In our administration of the law since the passage of that act, we have held that its provisions were not applicable to, and did not control the judge in his trial of the cause; that in this he was governed by the common law and the decisions of the Supreme Court of the United States; and in this we are fully sustained by the recent decision of the Supreme Court of the United States in Nudd v. Burrows, Assignee, 1 Otto, 426. Such being the rule by which we should be governed, we find it to be a well settled rule, 'that the Circuit Courts of the United States have no power to grant a preemptory non-suit against the will of the plaintiff.' Elmore v. Grymes, 1 Pet. 469; DeWolf v. Rabaud, 1 Pet. 497; Crane v. Norris *et al.*, 6 Pet. 598; Silsby *et al.* v. Foote, 14 How. 218; Castle v. Bullard, 23 How. 172; Boucicault v. Fox, 5 Blatchford, 87; Schuchardt v. Allens, 1 Wall. 359." 2. Upon a demurrer to evidence, every fact which can be reasonably inferred from the evidence is taken as admitted, and a demurrer is allowed in no case where there are facts and circumstances which tend to establish the issues. In the case of Young v. Black, 7 Cranch, 565, Justice Story says: "A demurrer to evidence is an unusual proceeding, and is allowed or denied by the court in the exercise of a sound discretion under all the circumstances of the case." And again, the same learned justice in the case of Towle v. Common Council of Alexandria, 11 Wh. 320, says: "It is no part of the object of such proceeding (demurrer) to bring before the court an investigation of the facts in dispute, or to weigh the force of testimony, or the presumptions arising from the evidence. That is the proper province of the jury." Again, "if, therefore, there is parol evidence in the case which is loose and undeterminate, and may be applied with more or less effect to the jury, or evidence of circumstances, which is meant to operate beyond the proof of the existence of those circumstances, and to conduce to the proof of other facts, the party demurring must admit the facts of which the evidence is so loose and undeterminate and circumstantial, before the court will compel the other party to join therein." And in the case of Reed v. Evans, 17 O. 128, the same rule is declared. See also, U. S. Bank v. Smith, 11 Wh. 172; Suydam v. Williamson, 20 How. 427. 3. As a general rule the master is not liable to his servant for injuries accruing to him for the negligence of a fellow servant engaged in a common employment. And all agents and employees who are engaged in the general business of operating a railroad are fellow servants. 4. The master, however, is bound to use ordinary care to employ and retain in his service competent servants. 5. If, therefore, injury should result to a brakeman upon a railroad from the negligence of an incompetent conductor, engineer or brakeman, in whose employment the railroad did not use ordinary care, it would be liable. 6. In such case the plaintiff would be entitled to compensatory damages only, unless such injury was "the result of wilful misconduct, or of that reckless indifference to the rights of the plaintiff, which is equivalent to an intentional violation of them."

Property of Religious Society—Effect of Secession of Part of Congregation.—*Jones et al. v. Wadsworth et al.* Court of Common Pleas of Philadelphia. 33 Leg. Int. 390. Opinion by Allison, J. 1. Whenever a church or religious society has been duly constituted, as in connection with, or in subordination to, some ecclesiastical organization or form of church government, and as a church so connected or subordinated, has acquired property by subscriptions, donations or otherwise, it can not break off this connection, and unite with some other religious organization, or become independent, save at the expense of impairing its title to the property so acquired. 2. The property of a religious society is held upon a trust, the terms of which are declared in the doctrines of religious belief upheld by the society, and in case of a congregation constituted as above described, its connection with the larger organization, of which it is a part, is one of these fundamental doctrines. An illegal severance of this connection is a violation of these fundamental doctrines, and, therefore, constitutes a diversion of the property to a wrongful use, to prevent which a court of equity will interpose on application of a party in interest. This doctrine was first clearly and broadly asserted by Lord Eldon, in the leading case of Attorney-General v. Pearson, 3 Merivale, 409. He considered the principles as having been settled by the House of Lords, upon appeal, in a case which had arisen in Scotland. His exposition of the law, has been the light by which courts have been guided in the determination of all similar cases, from that to the present day. He says, it is clearly settled, that if a fund, real or personal, be given in such a way that the purpose be clearly expressed to be that of maintaining a society of Protestant Dissenters, promoting no doctrine contrary to law, it is the duty of this court (the court of chancery) to carry such a trust as that into execution, and to administer it according to the intent of the founders. He adds, "I agree that religious belief is irrelevant to the matter in dispute, except so far as the king's court is called on to execute the trust." This case is cited with approval by Chief Justice Nelson, in Field v. Field, 9 Wend. 401; and in Miller v. Gable, 2 Denio, 510, Vice-Chancellor Hoffman says, "I think, in sound reasoning, supported by authority, there is a distinction between the dedication of property to support particular tenets, and its dedication to support such tenets in subjection to a particular church government. There may be a support of tenets without subjection to any ecclesiastical power which upholds them; but it may be a condition of a grant of property, that a trust is to be maintained in subordination to a particular power, as if a church be established in connection with a particular ecclesiastical body, a severance from that body would be a violation of the trust." This case was affirmed by the court of errors, on appeal. So also in Pennsylvania the same doctrine has been affirmed. In the case of the Presbyterian Church v. Johnson, 1 W. & S. 37, in the opinion of the majority of the court by Gibson, C. J., there is the concession of the principle, though holding that it did not apply to the case before the court, because no such condition as union with a particular Presbyterian connection was prescribed by the founder, or was made a condition of the grant, the grant being to "The Society of English Presbyterians Worshiping in the Borough of York." The Chief Justice remarks: "I concede also, that subjection to a particular judicatory may be made a fundamental condition of the grant. Even without an express condition, it might be a breach of the compact of association, for a majority of the congregation to go over to a sect of a different denomination, though it were different only in name. A congregation of seceders could not carry the church property into the Presbyterian connection, though these two sects have the same standards and plan of government." This case is sometimes cited as supporting the position that a substantial agreement in doctrine and form of church government, will justify a transfer of ecclesiastical connection from one kindred body to another, and along with such change of relations, to carry the property of the congregation into the new connection. But the statement of the chief justice shows, how far the majority of the court were from entertaining any such view of the law, and that in the assertion of a contrary doctrine, they were in entire accord with the minority of the court, as expressed in the dissenting opinion of Justices Kennedy and Houston. The members of the court differed on the material point which ruled the cause, whether a particular Presbyterian connection had been made a condition of the grant. The majority held that it had not, because no general assembly was in existence when the lot was donated, and became a severance of the body into two nearly equal parts, each claiming to be the true general assembly, and both adhering to the same standards of faith and form of church government, was a contingency not contemplated by the donors. This case is of the class referred to by the vice-chancellor, in Miller v. Gable, where property has been dedicated to support particular tenets and general form of church order, but where it is no part of the condition that it shall be enjoyed in subordination to any particular church government.

The case of Mears v. The Presbyterian Church, 3 W. & S. 303, is in substance an affirmance of the statement of Chief Justice Gibson in Johnson v. The Presbyterian Church, that subjugation to a particular judicatory may be made a fundamental condition of a grant, that a con-

gregation of seceders could not carry the church property in the Presbyterian connection. The grant was in trust for the associate Reformed Presbyterian Church of Shippensburg. The point decided is, that the property could not be enjoyed by a congregation of Presbyterians, members of the Presbyterian Church, under the government of the general assembly; the Associate Reformed Presbyterian Church, and the Presbyterian Church in the United States of America, though substantially one in faith, and each being Presbyterian in government, were separate and distinct bodies. A grant of property to one did not justify a use of church property in connection with the other organization. It was contended in that case, as also in this, that the designation of the *cestui que trust* is not strictly applicable to one of these denominations, more than to the other, because they are substantially the same; but it was held to be otherwise, and that a connection with a particular ecclesiastical government, was an essential condition on which the property was to be enjoyed. The same principle is maintained in App v. The Lutheran Congregation, 6 Barr, 209, the intention of the donor as to ecclesiastical connection being maintained by the court. Trustees v. Sturgeon, 9 Barr, 321, holds to the same view of the law. It is a case which falls on the other side of the line, established by the case of The Presbyterian Church v. Johnson, in 1 W. & S. The devise was for the support and maintainance of a Presbyterian clergyman, who shall statedly officiate in a house of worship, to be erected, etc. The testator was a member of a Presbyterian Church, which, after the disruption, became New School; he died in April, 1838; the New School Assembly was organized in May, 1838. An offer to prove the declared intention of the testator that the church should be New School was rejected, and the property was given to the Old School organization, on the ground that those only shall take, whether a majority or a minority, who adhere to the ecclesiastical government of the church which was in operation at the time the trust was declared. This case is strongly against the defendants on the position which they undertook to establish, that identity of faith and church government will enable a congregation to determine its own church connection. In the Church v. Johnson, 1 W. & S., the supreme court had called the two assemblies twin brothers, and declared that the Old School party succeeded to the privileges and to the property of the assembly, not because it was more Presbyterian than the other, but because it was the stronger of the two. This case was decided also upon the strict rule of legal intendment, in the face of an offer to prove an express intention to the contrary. Adherence to the legal successor of the assembly which existed when the trust was declared, was held to be an essential part of the trust, and that the *twin brother* could not exercise jurisdiction and authority over it.

The case of Watkins v. Wilcox, recently decided in the Court of Appeals of New York, would seem to be somewhat in conflict with the decision of the court in the case at bar. It was held that under the act of 1813, relating to the incorporation of religious societies, if property is given to a church or congregation, incorporated in pursuance of such act, by words vesting the title of the property in such corporation, and not plainly limiting the right to hold it with the faith, doctrine or order of any particular denomination or body, a change in the religious tenets or church discipline, held at the time of the acquisition, will not deprive the corporation of that property. In this case, a congregation which had been incorporated as a Dutch Reformed organization, being in connection with the ecclesiastical jurisdiction of the Dutch Reformed Church, and while so existing acquired property, by a vote of a greater portion of the members, severed such connection, and became a Congregational body. The court held the title to the church property to be in the new body. But see also, Winebrenner v. Calder, 7 Wright, 244; Schnorr's Appeal, 67 Penn. St. 138; Roshi's Appeal, 69 Id. 462.

Legal News and Notes.

—A statute of Daniel Webster was unveiled on Nov. 25, in Central Park, New York. It is by Thomas Ball, and was presented to New York city by Mr. Gordon W. Burnham. Including the pedestal, it weighs 125 tons, and cost $30,000.

—We have received the following letter from a correspondent: "In the JOURNAL of last week, page 764-5, you say that an attachment secures a lien that a bankrupt court will preserve. You don't mean if a judgment is rendered upon it; for the attachment is dissolved by the assignment of the register to the assignee. Revised Statutes, sec. 6044; Bump on Bankruptcy, pp. 495, 469. Your remark is liable to mislead those who are not familiar with the bankrupt act." Our correspondent is quite right, and we are obliged to him for the suggestion. The JOURNAL goes into the hands of a great many merchants and brokers, and the error left uncorrected, might lead them to suppose that the bankrupt act had been amended in this particular. We, of course, were not ignorant of the provisions of the bankrupt act referred to. They have been the subject of frequent discussion in this JOURNAL.

—At the Middlesex Assizes recently a prisoner having been convicted of attempting to steal a purse from the person of a woman, Mr. Serjeant Cox sentenced him to be kept in penal servitude for five years.—Prisoner: What! five years for an attempt? It ought only to to be two years. Notwithstanding this objection to the sentence of the court, the prisoner was passed to the cells below. Subsequently the prisoner was ordered to be again placed in the dock. Mr. Serjeant Cox, addressing him, said he thought that he had been convicted of stealing, but found that he was convicted only of an attempt to steal, and therefore that he (the learned serjeant) had no power to pass a sentence of five years, which he was very sorry for. He should, however, pass upon him the highest sentence the law allowed, which was to be imprisoned and kept to hard labour for two years.—Prisoner: I told you so; but that's getting off three years.

—The organization of the United States courts for the state of Colorado was commenced at Colorado last week. Present, Mr. Justice Miller and Judge Dillon. Sixty lawyers were admitted to the bar. The grand jury were sworn in. A rule ordering that a complete record be made by the clerk of all cases brought to the court, the same to be preserved among the records of the court, the costs thereof to be taxed against the party or parties instituting the suit, and to be collected as other costs, was made. Another, that any person possessing the qualifications prescribed by law for admittance to practice law in the courts of the state of Colorado, may be admitted to practice as an attorney and counsellor-at-law, solicitor in chancery, and proctor in admiralty, in this court, upon taking the oath of office. In the district court Robert E. Foote was appointed register in bankruptcy, and qualified. A rule on clerks of Arapahoe, Gilpin and Peublo counties district courts, to show cause why cases are not certified up, was made. In the circuit court objection was made in several cases that the papers were not certified by the clerk of the State court from which they came. Judge Dillon decided that every case should come up with a certificate that the proceedings in it had taken place in the court of which the circuit court is the successor.

—On Friday last the Circuit Court of St. Louis county, appointed two receivers for the St. Louis Mutual Life Insurance Company, at the suit of the state insurance commissioner. The application was violently opposed by a number of counsel representing individual policy holders, but the court refused to hear them on the preliminary application. The following is the form of the order entered:

Celsus Price, Superintendent Insurance Department of State of Missouri v. St. Louis Mutual Life Insurance Company.

This cause coming on to be heard on this 8th day of December, 1876, and the court having fully considered the motion for temporary injunction and appointment of receivers, it is ordered that the defendant, the St. Louis Mutual Life Insurance Company, and all persons or parties acting for, or on its behalf, be enjoined and restrained, until the further order of this court, from further proceeding with the business of said insurance company, or exercising further control over its property or affairs; and that James M. Franciscus and Frederick Von Phul be, and the same are hereby appointed receivers of the property and effects of the St. Louis Mutual Life Insurance Company, and authorized to take immediate possession of the same, and to demand and receive the assets belonging to said company from the officers of the Columbia Life Insurance Company, or in whosoever hands the same may be found, and to hold and retain the same as receivers of this court, subject to its further orders in the premises.

And it is further ordered that said receivers, before entering upon the discharge of their duties, shall file their individual bond in the sum of $50,000, with good and sufficient securities, to be approved by this court. It is further ordered that a writ and commission issue against said defendant herein, returnable in three days from this date. It is further ordered that Frank J. Bowman, Esq., be appointed as attorney to assist the plaintiff in these proceedings.

—The New York *Daily Register*, is publishing a new edition of *Termes De La Ley* and as all our readers may not have the latest edition, of a law dictionary in their libraries we copy the definitions for their benefit, as follows:

Arrest—The sense of repose which an absconding debtor feels when he is taken into custody.

Assuming Question—A question put to a witness which covertly insinuates that he has already said or admitted something which he has not, while directing his attention to another point to be answered. It is a trap often set by over-astute counsel, in the hope that the witness will answer and the jury take the question as part of the answer. A single exposure of the trick forfeits the confidence of the jury.

Attachment—The affection which a deputy sheriff feels for the assets of an absent debtor.

Attorney and Client—The tenderest relation in the world. The attorney's chief object is to suit the client, and the client's will is the attorney's law.

Bail—A friend in need who becomes a friend in *deed* by going on the bond.

Bastardy—A special proceeding now more honored in the breach than the observance.

Bill of Particulars—A device for getting an inventory of the ammunition in your adversary's camp.

Bill of Peace—An adroit way of stealing a march on the enemy, and bringing on a general engagement all along his line before he is prepared for it.

Bona fide—Winking at the right moment.

Bribery—To act for self in the name of justice. The worst bribery is the gratuitous self bribery of the magistrate, who volunteers to reward by his decisions those who secured for him his place; for it is the most corrupt of offences, indulged with the comfortable complacency that it is the virtue of gratitude; and while it can never be concealed from the spectators, it can never be proved by its victims.

Courtesy—The politeness of the law to a widower, in leaving him in possession of his lamented wife's real property for life on account of his great affliction; whereas, if *she* had lost only *him*, she could have staid in his principal house forty days and then have had to wrangle with the heirs for possession of only a third of his land.

Infant—A young man who is sharp enough to make a bargain which he can enforce but the other party can not.